

Comparative Study on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (GRTKTCE)

Comparative Study of Existing GR, TK
and TCE Legislation and Approaches
with Recommendations for Best Practice
National Policies and Laws



ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)
Economic Cooperation Support Programme (AECSP)

Comparative Study of existing Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) legislation and approaches with recommendations for best practice model national policies and laws

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ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)
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WARNING

Terri Janke and Company would like to advise readers that this paper may contain images or names of people who have since passed away.

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Acknowledgement

This study was developed as an output under Milestone three (3) under the Project on Comparative Study on Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions (GRTKTCE) (Phase 1) [AANZ-0083-IP-13], as part the IP component of the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) Economic Cooperation Support Programme (AECSP).

Entered into force on 1 January 2010, AANZFTA provides a platform for more liberal, facilitative and transparent market access and investment regimes among the twelve Parties to the Agreement. More information about the AANZFTA and AECSP can be found at the AANZFTA website: <https://aanzfta.asean.org/>.

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Glossary

Abbreviations

Abbreviation	Full Form
AANZFTA Parties	ASEAN-Australia-New Zealand Free Trade Area Parties
ABS	Access and Benefit Sharing
ACL	Australian Consumer Law
AEC	ASEAN Economic Community
AECSP	AANZFTA Economic Cooperation Support Programme
ASEAN	Association of Southeast Asian Nations
ASEC	The Association of Southeast Asian Nations Secretariat
CBD	Convention on Biological Diversity 1992
ECWP	Economic Cooperation Work Plan
FAO	UN Food and Agriculture Organization
GI	Geographic indication
GR	Genetic Resources
GRTKTCE Survey	Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey
IACB	Indian Arts and Crafts Board (US)
ICIP	Indigenous Cultural and Intellectual Property
IP	Intellectual Property
IPR	Intellectual Property Rights
NCIP	National Commission on Indigenous Peoples
NGO	Non-governmental organisations
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
TKDL	Traditional Knowledge Digital Library
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDP	United Nations Development Programme
WIPO	World Intellectual Property Organization
WIPO IGC	World Intellectual Property Organization Intergovernmental Committee

Terms

Consultative Workshop	The Consultative Workshop on Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expression (TCE), held via Zoom on 29-30 April 2021. The purpose of the Consultative Workshop was to enhance understanding and awareness of AANZFTA Parties of the approaches to protection and promotion of GR, TK and TCE and the policy issues that need to be considered in developing national policies and laws on Intellectual Property related aspects of GR, TK and TCE.
Indigenous and Local Communities	The term “Indigenous and Local Communities” has been adopted from the Convention on Biological Diversity (CBD) and is also used by WIPO. This term was adopted by the CBD to refer to communities with long association with the lands and waters they have traditionally lived on or used. ¹ This definition is similarly used in this report for ease of reading. However, we note the United Nations Environment Programme’s position that a more specific definition is neither desirable nor appropriate, as the principle of self-determination requires that Indigenous peoples have their right to maintain distinct identities and to define the term for themselves. ²
Geographic Indications	According to WIPO, a Geographic Indication is a “sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of product, there is a clear link between the product and its original place of production” ³
GRTKTCE Survey	The Genetic Resources, Traditional Knowledge and Traditional Cultural Expression Survey, circulated to the AANZFTA Parties prior to the Consultative Workshop. The aim of the survey was to gather information on existing GR, TK and TCE legislation and policy in the region, and identify the objectives of the AANZFTA Parties.

¹ Compilation of views received on the use of the term “indigenous peoples and local communities”, Note by the Executive Secretary (2013) p 4.

² Compilation of views received on the use of the term “indigenous peoples and local communities”, Note by the Executive Secretary.

³ WIPO, *Geographical Indications* <https://www.wipo.int/geo_indications/en/>.

List of case studies

The AANZFTA Parties

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Executive Summary

The first section of this Comparative Report provides context on the work of WIPO's Intergovernmental Committee (WIPO IGC), as well as the current AANZFTA free trade agreement between the parties, and other key policy documents from the ASEAN Economic Community.

Part 2 of the paper examines what GR, TK and TCE are. TK and TCE varies, given the diversity of Indigenous and Local Communities, and there is often overlap between the concepts. Nevertheless, GR, TK and TCE should still be considered individually as the different forms have been misappropriated and exploited in different ways. Therefore, different legal and non-legal mechanisms must be deployed to address specific forms of misappropriation.

Part 3 follows on from the discussion in Part 2 and considers the policy levers of the AANZFTA countries. It examines some of the key methodologies that academic commentary has used to characterise policy objectives including positive versus defensive protections and the differences between promotion and protection.

The legal analysis begins in Part 4. This section looks first at the strengths and challenges of IPR laws in the protection of GR, TK and TCE. It looks specifically at case studies from the AANZFTA Parties – both case studies illustrating the failings of conventional IPR law, and case studies demonstrating how the AANZFTA Parties have amended their IPR laws to better protect GR, TK and TCE. Given that protection of GR, TK and TCE is multidisciplinary, the next section looks at non-IPR laws that have impacted the protection of GR, TK and TCE. Sui generis laws are addressed in a separate part. This part considers some of the standalone legislative models that aim to protect GR, TK and TCE, in whole or in part. Part 4 concludes with an analysis of regional cooperation issues. We examine several regional model laws that exist outside the ASEAN region, and then look at a comparative analysis of the multilateral agreements and free trade agreements currently in place within ASEAN.

Part 5 looks at the non-legal approaches that can be used to better protect GR, TK and TCE. It starts with an explanation of the role non-legal approaches play within protection frameworks. Non-legal protection measures include: education and public awareness programs, protocols, defensive databases, supply models, customary laws and cultural authorities, and the use of private agreements to regulate parties' conduct. This Part then concludes by considering possible authority models for rights management, and government policy responses that can be used to guide conduct. This section includes case studies from within and without the ASEAN region to illustrate best practice models.

Part 6 is divided into two sections. The first provides a summary of the approaches, and includes a comparative analysis of the current GR, TK and TCE adopted by the AANZFTA Parties. The second section concludes the Comparative Study with recommendations for the AANZFTA Parties. The recommendations include legal and non-legal mechanisms, as well as recommendations that will help to facilitate regional implementation of best practice protections. These recommendations are specifically designed to assist AANZFTA Parties to enhance protection of GR, TK and TCE in order to reduce impediments to free trade and promote economic integration in the ASEAN region.

Introduction

1.1. Engagement of Terri Janke and Company

In 2020, the Association of Southeast Asian Nations Secretariat (ASEC) engaged Terri Janke and Company to undertake the Comparative Study on Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions (GR, TK, TCE) (Phase 1) (the Project). This Project is part of the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) Economic Cooperation Support Programme (AECSP) under the Intellectual Property component of the Economic Cooperation Work Programme (ECWP).

1.2. Background and context

1.2.1. The WIPO Intergovernmental Committee

There is currently no established international standard for intellectual property protection for GR, TK or TCE. These protections remain a topic of negotiation at the World Intellectual Property Organization (WIPO). The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in 2000. WIPO had been working with the Intellectual Property community since the 1960s in relation to TK and TCE. Historically, biodiversity and GR concerns had been the province of non-IPR laws. However, in the later decades of the twentieth century, it became increasingly clear that GR and TK had relevance to IP protection as well, particularly through patent law. Rapid advances in scientific research and technology and the recognised economic potential of GR added urgency to the need to address these concerns.⁴ Moreover, a trend emerged: developing countries are frequently biodiversity rich countries, while developed countries tend to have greater access to the resources and technology required to exploit biodiversity and GR. As a result, the need to address access and benefit sharing solutions took on an ethical dimension: developed countries must be restrained from inequitable exploitation of developing countries.⁵

Ultimately this led to a broadening of WIPO's remit and GR came onto the agenda. The consultations, research and fact-finding missions of the 1990s led to the recommendation that a distinct body be established to consider the IP implications of GR, and that that research also be joined with work related to TK and TCE.⁶ This resulted in the establishment of the IGC. The work of the IGC is to facilitate negotiations that can then be implemented into practical measures to improve protections of GR, TK and TCE, for example in the form of recommendations, model laws, and treaties.⁷ The IGC members are WIPO member states (mostly their IP offices).⁸ However, other participants in WIPO IGC sessions include intergovernmental organisations (including the secretariats of CBD, UNESCO and the United Nations Food and Agriculture

⁴WIPO, 'The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (Background Brief No. 2, WIPO 2015) p 1-2
<https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf>.

⁵ Ibid

⁶ Ibid p.2.

⁷ Ibid 1.

⁸ Ibid 1-2.

Organisation) and NGOs. Given that the primary asset holders of GR, TK and TCE are developing countries and indigenous peoples, it is essential, and in accordance with the principle of self-determination, that developing countries and indigenous peoples actively participate in these IGC sessions either as members or participants.⁹ To that end, the WIPO IGC has implemented practical measures to facilitate this participation, for example, the WIPO Voluntary Fund to help fund Indigenous and Local Communities' participation.¹⁰

Since its inception in 2000, the WIPO IGC has produced many resources designed to improve countries' ability to effectively manage the IP aspects of GR, TK and TCE including glossaries, databases and training programs.¹¹ In 2008 the WIPO IGC commissioned gap analyses on the protection of traditional cultural expressions/expressions of folklore, and traditional knowledge. They were updated in 2017.¹² These gap analyses facilitated the preparation of the draft articles for the protection of traditional cultural expressions/folklore and traditional knowledge against misappropriation and misuse.¹³ The WIPO IGC also developed a consolidated document relating to the IP aspects of GR.¹⁴

This is a brief overview of the history of the WIPO IGC and its work to-date. The WIPO resources were used as a key research source in this Report, and the draft articles are a particularly good reference for best practices. However, progress on the draft articles is on-going, and the Report is designed to give the AANZFTA Parties further law and policy guidance on the protection of GR, TK and TCE while the work of the WIPO IGC continues.

⁹ Ibid 2.

¹⁰ Ibid 2.

¹¹ Ibid 3.

¹² Secretariat, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (Paper presented at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 37th session, No. WIPO/GRTKF/IC/37/7 Geneva, 27 August 2018) (available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365);

Secretariat, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (Paper presented at the Intergovernmental Committee on Intellectual Property and Genetic Resources 37th session, Traditional Knowledge and Folklore No. WIPO/GRTKF/IC/37/6, Geneva, 27 August 2018) (available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=411448).

¹³ WPO, 'The Protection of Traditional Knowledge' (Draft Articles, WIPO/GRTKF/IC/40, WIPO, 19 June 2019) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439178>; WIPO, 'The Protection of Traditional Cultural Expressions' (Draft Articles, WIPO/GRTKF/IC/40, WIPO, 19 June 2019) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439176>.

¹⁴ 'The Consolidated Document Relating to Intellectual Property and Genetic Resources REV. 2 (clean)' (Paper presented at Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 35th session, Switzerland, 23 March 2018) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=402441>.

1.2.2. The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area

The Agreement establishing the AANZFTA entered into force in 2010, with an update in 2015. In fact, the Agreement is undergoing another review, commenced in 2018.¹⁵ The AANZFTA Agreement established the ASEAN, Australia, New Zealand Free Trade Area.¹⁶

Chapter 13 of the Agreement addressed Intellectual Property. Its objective is to reduce impediments to trade and investment by promoting economic integration amongst the parties.¹⁷ In particular, Article 8 reads:

Genetic Resources, Traditional Knowledge and Folklore

Subject to each Party's international obligations, each Party may establish appropriate measures to protect genetic resources, traditional knowledge and folklore.¹⁸

The Chapter further advocates for regional co-operation in the achievement of the objectives and establishes the AANZFTA Committee on Intellectual Property (**IPC**) consisting of representatives of the AANZFTA Parties to administer the objectives in the Chapter.¹⁹

Two of the duties of the IPC are particularly relevant to this Report:

- The IPC must determine its work programme in response to priorities identified by the AANZFTA Parties, and
- The IPC may agree to measures in order to promote dialogue between the AANZFTA Parties on IP issues.²⁰

This explanation of the AANZFTA provides context in relation to the current work of the Association of Southeast Asian Nations, and in particular the ASEAN Vision 2020 and the ASEAN Economic Community Blueprint 2025 (discussed below).

1.2.3. The ASEAN Economic Community Blueprint 2025 & the ASEAN IPR Action Plan

The ASEAN Vision 2020 was “to transform ASEAN into a stable, prosperous and highly competitive region with equitable economic development, and reduced poverty and socio-economic disparities.”²¹ The result was the establishment of the ASEAN Economic Community

¹⁵ ASEAN-Australia-New Zealand FTA, Department of Foreign Affairs and Trade <<https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/Pages/asean-australia-new-zealand-free-trade-agreement>>.

¹⁶ *The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* ('AANZFTA'), opened for signature 27 February 2009) [2010] ATS 1 (entered into force 1 January 2010) ch 1 art 2 (available at <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2010/1.html>).

¹⁷ AANZFTA, ch 13, art 1.

¹⁸ AANZFTA, ch 13, art 8.

¹⁹ AANZFTA, ch 13, art 9 & 12.

²⁰ AANZFTA, ch 13, art 12(4)-(5).

²¹ ASEAN, 'ASEAN Economic Community Blueprint' (Blueprint, Association of Southeast Asian Nations, 20 November 2007) para 1 (available at <https://asean.org/wp-content/uploads/archive/5187-10.pdf>).

(AEC). The AEC's key strategic plan is the ASEAN Economic Community Blueprint 2025. The Blueprint includes an undertaking to promote protection of GR, TK and TCE and to assist in their protection and in foreign markets.²² Additionally, development of the healthcare system will include traditional knowledge and medicine, subject to appropriate GR, TK and TCE protection mechanisms.²³

Simultaneously, the ASEAN Working Group on Intellectual Property Cooperation, which includes representation from the IP offices of the 10 ASEAN states, has prepared a 10-year action plan to meet the goals of AEC. This action plan is referred to as the ASEAN IP Rights Action Plan 2016-2025. A key initiative is the development of a protection mechanism for GR, TK, and TCE.²⁴

This initiative is broken up into 4 stages:

- A preliminary study by interested ASEAN member states to compare several countries GR, TK, and TCE laws
- Development of national policies and laws related to GR, TK, and TCE for ASEAN member states
- Development a network of GR and TK databases for interested ASEAN member states, and
- Implementation of regional co-operation agreements (e.g. a code of conduct).²⁵

1.2.4. How does this Report contribute?

To summarise the discussion up to this point:

- GR, TK and TCE are potential assets held by Indigenous and Local Communities and developing countries
- GR, TK and TCE all have implications within IP laws, but are interdisciplinary and IP measures for protection require broad consultation and consideration of non-IPR laws and policies
- Scientific research, technological development and globalisation have increased interest in the economic potential of GR, TK and TCE and facilitated foreign access to these resources
- It is usually developed countries that have the greatest financial resources to access and exploit GR, TK and TCE resources, while Indigenous and Local Communities and

²² ASEAN, 'ASEAN Economic Community Blueprint 2025' (Blueprint, Association of Southeast Asian Nations, 22 November 2015) para 31.iv.d (available at https://ditjenppi.kemendag.go.id/assets/files/publikasi/doc_20180504_aec-blueprint-2025.pdf).

²³ Ibid para 60.

²⁴ ASEAN, 'The ASEAN Intellectual Property Rights Action Plan 2016-2025', (Action Plan, ASEAN, 01 January 2016), initiative 19 (available at <http://containeronline.ca/databasecil/2016-2025-the-asean-intellectual-property-rights-action-plan-meeting-the-challenges-of-one-vision-one-identity-one-community-through-intellectual-property/>).

²⁵ ASEAN, 'The ASEAN Intellectual Property Rights Action Plan 2016-2025', (Action Plan, ASEAN, 01 January 2016) Initiative 19.1-19.4 (available at <http://containeronline.ca/databasecil/2016-2025-the-asean-intellectual-property-rights-action-plan-meeting-the-challenges-of-one-vision-one-identity-one-community-through-intellectual-property/>).

developing countries are often asset rich. This has led to a pattern of exploitation and misappropriation of GR, TK and TCE

- This has led to Indigenous and Local Communities and developing countries to capacity build so that they may implement the necessary protections for the GR, TK and TCE resources while also finding ways to equitably commercialise these assets in their countries and regions

In the AANZFTA, ASEAN, Australia and New Zealand have agreed to use IP laws to better protect GR, TK and TCE in order to reduce impediments to trade and investment and promote economic integration. The ASEAN Economic Community is working towards the same end through their strategic plans (the Blueprint 2025 and the ASEAN IP Rights Action Plan 2016-2025).

So, how does this Report help AANZFTA Parties to protect their GR, TK and TCE, while also finding ways to equitably commercialise it, and promote free trade between the AANZFTA parties? The comparison of laws and policies within the AANZFTA region will inform the AANZFTA parties of their current standing in relation to GR, TK and TCE protection mechanisms. The analysis of best practice models within the AANZFTA region and comparison with regional model laws outside the region (particularly in other resource rich regions) will assist the AANZFTA parties to develop further action plans and strategies to implement these protections in their own countries. Having these protections in place will in turn help to promote free and equitable trade in the IP aspects of GR, TK and TCE within the region. This amounts to the reduction in impediments envisaged by the AANZFTA and the promotion of economic integration in the AANZFTA region.

1.3. Project Scope & objective

The objective of the Project is the enhanced understanding and awareness of the AANZFTA Parties of the approaches to protection and promotion of GR, TK and TCE and the policy issues that need to be considered in developing national policies and laws on IP-related aspects of GR, TK and TCE.

The Project compares the AANZFTA Parties' current legislation on GR, TK and TCE against approaches from outside the region. This comparison explores best practices and will assist AANZFTA Parties to enhance their current legal and non-legal measures for the protection of GR, TK and TCE.

NOTE: This Project acknowledges that best practice for the AANZFTA Parties, will be dependent on their national circumstances, and the Indigenous and Local Communities within their countries. We further note that this information on the protection of GR, TK and TCE is relevant to the protection of a variety of cultural knowledges, belonging to communities, including, but not limited to Indigenous communities. For this reason, the term, Indigenous and Local Communities has been adopted in this Report. See Section 2.3 for further discussion.

This Project has 3 outputs:

Output 1: a preliminary Consultative Workshop on GR, TK and TCE policy considerations

Output 2: a Comparative Study of existing GR, TK and TCE legislation with recommendations for best practice model national policies and laws

Output 3: a Regional Workshop on the development of relevant national policies and laws related to GR, TK and TCE.

1.4. Overview of Report

This Study is an analysis of legal and non-legal approaches, based on the improved understanding of the policy objectives of the AANZFTA Parties supplied through the Consultative Workshop of GRTKTCE Survey (output 1).

It will begin by defining and explaining some of the key issues. We provide examples of diverse forms of GR, TK and TCE and consider the factors that contribute to the development of policy objectives. With the benefit of the GRTKTCE Survey results, we consider some of the policy priorities that emerged from the responses of the AANZFTA Parties. We conclude with a brief consideration of the issue of data sovereignty – an issue of increasing relevance as new forms of technology are developed and incorporated in legal and non-legal responses to the misuse of GR, TK and TCE.

We have separated legal and non-legal responses into separate sections. This is for ease of reading, but in fact legal and non-legal responses often catalyse each other. For example, new legislation often gives rise to a number of policies and guidelines. These policies and guidelines are not legal instruments, nevertheless, knowing how they apply involves an understanding of the law. The case studies throughout this study will make this evident.

The analysis of legal approaches looks first at existing law approaches, both in intellectual property regimes, and more broadly. It then looks at *sui generis* laws created specifically to address the issues associated with the misuse of GR, TK and TCE. This part concludes with an examination of some of the key issues concerning international co-operation. The GRTKTCE Survey and Consultative Workshop made it clear that much misuse, misappropriation, and biopiracy frequently occurs across state borders, for example by companies from other parts of the world. Therefore, consideration needs to be given to mechanism that might either discourage this misuse in the first place, or provide an enforcement mechanism when it does occur.

Analysis of non-legal approaches asks the question: in the absence of legislative change, what can be done now, to bring us closer to achieving our policy objective? This section will examine the role of education and public awareness campaigns in promotion of best practice management of GR, TK and TCE. Protocols are often used as strategy documents to guide a project or industry in best practice, and can be given legal effect through contract law. Defensive database can be a legal or non-legal measure depending on how they are implemented. Nevertheless, they play an important role in the protection of GR, TK and TCE, and are actually specifically mentioned in

the ASEAN Intellectual Property Rights Action Plan 2016-2025.²⁶ Supply models can promote business norms that facilitate equitable commercialisation of GR, TK and TCE and could even promote economic integration when applied regionally. Integrating protection mechanisms with existing cultural law and cultural authority enhances the cultural integrity of the measure, and improves its chance of success by building on existing structures and frameworks. Establishing rights management bodies can improve on the bargaining power of individuals and smaller groups who may not have the resources or legal/policy knowledge to enforce their rights. Finally, this section looks at other government and policy responses that could further protect GR, TK and TCE, promote access and benefit sharing practices and consent models.

This Study concludes with summary recommendations and conclusions. These will be divided into legal measures, non-legal options and recommendations for the facilitation of regional co-operation. In the context of the AANZFTA, these recommendations are intended to empower AANZFTA parties to better protect their GR, TK and TCE, so that they can then be able equitably commercialise their GR, TK and TCE resources (where appropriate) and contribute to the economic integration of the AANZFTA region.

2. What is GR TK and TCE

This section will provide a brief elaboration on the definition of GR TK and TCE. GR, TK and TCE can be very different from each other, but can also overlap. For example, biopiracy of TK and GR is a different issue from the cultural appropriation that occurs when a clothing brand copies a community's traditional designs (a form of TCE).

Nevertheless, the strict separation of science and art is a western concept and so there is frequently overlap between GR, TK and TCE. For example, a traditional story, or song (TCE) can be a means of transmitting TK about GR.

GR, TK and TCE can vary enormously between Indigenous and Local Communities so these definitions should be understood as general working definitions only.

2.1. Traditional Knowledge

Traditional knowledge (TK) is a living body of knowledge, know-how, skills and practices that are developed, sustained and passed through generation to generation within a community, often forming part of its cultural or spiritual identity.

TK can be found in many different contexts, such as agricultural, scientific, technical, ecological and medicinal knowledge, as well as biodiversity related knowledge. TK is also expressed through Traditional Cultural Expressions (TCE) including art, dance, stories, songs and language.

There are countless forms and instances of TK across the world. In Australia, Aboriginal and Torres Strait Islander peoples hold valuable TK about land management including cultural fire

²⁶ ASEAN, 'The ASEAN Intellectual Property Rights Action Plan 2016-2025', (Action Plan, ASEAN, 01 January 2016) Initiative 19.3 (available at <http://containeronline.ca/databasecil/2016-2025-the-asean-intellectual-property-rights-action-plan-meeting-the-challenges-of-one-vision-one-identity-one-community-through-intellectual-property/>).

management of country, seasonal calendars and caring for country practice.²⁷ In China, traditional Chinese medicine, has a significant association with Genetic Resources (**GR**) as a result of the use of plant medicines. This alludes to the inherent association between traditional knowledge and some genetic resources, which will be discussed in Section 2.2.

What does 'traditional' mean?

Knowledge or cultural expressions are not 'traditional' solely because of their antiquity. Many forms of TK or TCEs are not ancient or inactive, but rather living and dynamic aspects of the lives of many communities today.

Instead, 'traditional' refers to a form of knowledge expression which has a traditional link with a community. These expressions and knowledge are developed, sustained and transmitted within a community, sometimes through customary systems of transmission. Ultimately, it is the relationship with the community that makes knowledge or cultural expressions 'traditional'.²⁸

2.2. Genetic Resources

Article 2 of the Convention on Biological Diversity defines Genetic Resources (**GR**) as genetic material of actual or potential value.²⁹ This applies to parts of biological materials that contain genetic information of such value and are capable of reproducing or being reproduced.³⁰ Examples of GRs include material of plant, animal, or microbial origin, such as medicinal plants, agricultural crops and animal breeds, microorganisms, plant varieties, animal breeds, genetic sequences, nucleotide and amino acid sequence information, traits, molecular events, plasmids, and vectors.³¹

Indigenous and Local Communities frequently hold TK on the use and conservation of a biological resource that is, or contains, GR. Knowledge of this TK can provide scientific researchers with valuable information about the resource and its properties.³² This information can lead to scientific developments. Just as frequently, this research is simply recognition by western science of the medicinal or other knowledge that has been held by Indigenous and Local Communities for generations.

²⁷ Blackwell, Boyd et al, Centre for Aboriginal Economic Policy Research, Methods for Estimating the Market Value of Indigenous Knowledge, IP Australia 2019, p 94
<https://www.ipaustralia.gov.au/sites/default/files/caepr_final_report_on_ik.pdf>.

²⁸ Secretariat, 'Elements of a *Sui Generis* System for the Protection of Traditional Knowledge' (Report No. WIPO/GRTKF/IC/3/8, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3rd session, Geneva 13 June 2002) p 6, para 12-13 (available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8).

²⁹ *Convention on Biological Diversity*, signed 5 June 1992, [1993] ATS 32 (entered into force 29 December 1993) art 2.

³⁰ Ibid.

³¹ WIPO, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' (Publication No. 933E, WIPO, 2020)
<https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf>.

³² Ibid.

The use of GR and associated TK, without respect, consent, or benefit sharing, is often referred to as biopiracy.³³ The unethical use of GR and associated TK is a significant issue and frequently occurs internationally.

Example: Turmeric (*Curcuma longa* (Zingiberaceae))

In March 1995, the US Patent and Trade mark Office (**USPTO**) granted Patent US5401504A for the wound healing properties of turmeric to two Indian scientists who were working with the University of Mississippi Medical Centre.³⁴ In India, this decision caused great controversy within the scientific community, which claimed that it was an act of biopiracy.³⁵ The Indian Council for Agricultural Research and Council for Scientific and Industrial Research requested a USPTO re-examination on the basis that the patent lacked novelty as turmeric has been used for medicinal purposes in India for centuries. Based on evidence provided by the Indian authorities, including scientific publications, books on home remedies and ancient Ayurvedic texts on Indian systems of medicine, the patent was eventually revoked by the USPTO.³⁶

2.3. Traditional Cultural Expressions

Traditional Cultural Expressions (**TCE**) often include any artistic or traditional expressions, tangible or intangible, which are characteristic of a community's cultural and social identity and cultural heritage.³⁷ Such TCEs are maintained, used or developed by these communities.

TCEs may be thought of as the forms in which the culture of an Indigenous or Local Community is expressed, forming part of the identity and heritage of such communities. These TCEs are passed down from generation to generation and are integral to the cultural and social identities of Indigenous and Local Communities, particularly through their embodying of know-how and skills and transmission of core values and beliefs.³⁸

Examples of TCEs include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions. For example, the Men's Grass Dance performed by Native American peoples or traditional Japanese woodblock printing practices.

TCEs may sometimes be protected by existing intellectual property systems, such as copyright and related rights, geographical indications, appellations of origin and trademarks. For example,

³³ WIPO, *Traditional Knowledge and Intellectual Property – Background Brief* <https://www.wipo.int/pressroom/en/briefs/tk_ip.html>.

³⁴ Sabharwal, Anika, Chadha & Chadha, *Biopiracy in India: Scientific eruption or traditional disruption?* (22 July 2020) IAM <<https://www.lexology.com/library/detail.aspx?q=1c132aa5-97af-4164-af22-ca3c240ab172;%20>>; Saipriya Balasubramanian, *India: Traditional Knowledge And Patent Issues: An Overview Of Turmeric, Basmati, Neem Cases* (18 April 2017) Mondaq <<https://www.mondaq.com/india/patent/586384/traditional-knowledge-and-patent-issues-an-overview-of-turmeric-basmati-neem-cases>>.

³⁵ Anika Sabharwal and Chadha & Chadha, *Biopiracy in India: Scientific eruption or traditional disruption?* (22 July 2020) IAM <<https://www.lexology.com/library/detail.aspx?q=1c132aa5-97af-4164-af22-ca3c240ab172;%20>>.

³⁶ Ibid 18.

³⁷ WIPO, *Traditional Cultural Expressions* <<https://www.wipo.int/tk/en/folklore/>>.

³⁸ WIPO, *Traditional Cultural Expressions* <<https://www.wipo.int/tk/en/folklore/>>; WIPO, 'Intellectual Property and Traditional Cultural Expressions/Folklore' (Booklet No. 1, WIPO, 2005) (available at <https://www.wipo.int/publications/en/details.jsp?id=122&plang=AR>).

contemporary adaptations of TCEs may be copyrightable and trademarks can be used to identify authentic Indigenous arts.

TCE or Folklore?

Although the term 'expressions of folklore' has commonly been used in international discussions and is still found in many national laws, some communities expressed reservations around using the term 'folklore' due to negative connotations associated with the word. Nowadays, WIPO often uses the term 'traditional cultural expressions' (or TCEs). Where it is used, 'expressions of folklore' is understood as synonymous with TCEs.³⁹

Since the mid-1980s, there has been increased debate surrounding what terminology is best and most appropriate for the description of creations deriving from a cultural community.⁴⁰ In particular, questions arose regarding the use of the 'folklore' which some nations states considered to be an outdated term, carrying negative connotations of being associated with lower or superseded societies and/or cultures.⁴¹

Other concerns pertaining to the use of the term 'folklore' have also included the insufficient or narrow conception of folklore in western traditions which tend to focus on artistic, literary and performative works, as opposed to broader understandings encompassing all facets of cultural heritage.⁴² Other criticisms have included that within western philosophy, 'folklore' implies that the cultural expression is dead, something to be collected and preserved rather than a component of a living cultural tradition.⁴³

Therefore, as a result of these critiques, the use of the term 'traditional cultural expressions' has been adopted and favoured over the term 'folklore'. Moreover, some countries have also chosen to adopt other terminology to best describe TCEs within their national context. In Australia, Indigenous Cultural and Intellectual Property (**ICIP**) is used to refer to the rights of Aboriginal and Torres Strait Islander peoples to their heritage including all objects sites and knowledge, the nature and use of which has been transmitted or continues to be transmitted from generation to generation. ICIP would include all forms of GR, TK and TCE. IP Australia generally uses the term *Indigenous Knowledge (IK)* to refer to TCEs and TK, including those in relation to GRs. This is due to the attitude that the term 'folklore' is, again, too narrow to adequately define indigenous Australian cultural expressions, as well as the term's implication that the cultural and intellectual property of Indigenous peoples is inferior to the dominant culture.⁴⁴ We also note that within Indonesia, the term 'Local Wisdom' is also used to refer to Traditional Knowledge.⁴⁵

³⁹ WIPO, 'Intellectual Property and Traditional Cultural Expressions/Folklore' (Booklet No. 1, WIPO, 2005) (available at <https://www.wipo.int/publications/en/details.jsp?id=122&plang=AR>).

⁴⁰ WIPO, Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Miranda Risang Ayu Palar, Academic Member, Head of Study Centre from Intellectual Property Center on Regulation and Application Studies, Faculty of Law, Universitas Padjadjaran, Regional Workshop on Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (GRTKTCE) Policy Considerations, 4-5 August 2021).

There are also discussions about what terms should be used to refer to the *beneficiaries* of the protection of TCEs/Expressions of folklore. In earlier international discussions, predominantly led by WIPO, emphasis was placed on 'indigenous peoples', however other terms which have since been utilised include 'traditional communities', 'local communities' or other variations of these terms.⁴⁶ The use of these broader terms allows for recognition of different languages, belief systems, and cultural groups/communities which may co-exist within national contexts.⁴⁷ Ultimately, WIPO has encouraged the choice of terms used to describe the beneficiaries of protection be flexible and determined through national and community consultations.⁴⁸

3. What are the policy levers?

This section examines policy objectives in more detail. However, before we consider specific policy objectives in detail, we should first consider what lies behind the motivations to improve outcomes for Indigenous and Local Communities and their GR, TK and TCE.

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* reads that:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge and the properties of fauna and flora, oral traditional, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.⁴⁹

The Declaration recognises the inherent human rights of indigenous peoples, and their right to all manifestations of their culture. The second clause is a call to action for states to implement the necessary measures to give effect to those rights. So in the first instance, there is certainly an ethical obligation on states to support Indigenous and Local Communities in the practice and promotion of their culture.

There are also significant practical reasons to assist Indigenous and Local Communities in cultural maintenance and practice. Indigenous and Local Communities hold vast amounts of knowledge. This includes knowledge about land management and environmental practices. The UN Food and Agriculture Organisation (**FAO**) has estimated that natural disasters are occurring three times more often than they were 50 years ago.⁵⁰ These include megafires, extreme weather events and emerging biological threats.⁵¹ These disasters can lead directly to loss of life as well as indirect loss of life through the repercussions on living conditions and food shortages. According to the FAO, agriculture bears 63% of the impact of disasters, seriously threatening

⁴⁶ WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventh Session Geneva, November 1 to 5, 2004 (available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=6183&la=EN)

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 31(1)-(2).

⁵⁰ United Nations, *Natural disaster occurring three times more often than 50 years ago: new FAO report* (18 March 2021) <<https://news.un.org/en/story/2021/03/1087702>>.

⁵¹ Ibid.

food security.⁵² The FAO estimated that between 2008 and 2018, crop and livestock loss equated to the annual calorie intake of seven million adults.⁵³ Collaboration with Indigenous and Local Communities to improve land management and environmental practices is vital.

It would also be consistent with the Sustainable Development Goals adopted by all United Nations Member States in 2015.⁵⁴ Goal 2.5 specifically advocates for the promotion of access to fair and equitable sharing of benefits arising from the utilisation of GR and associated TK.⁵⁵

3.1. What are policy objectives?

Policy objectives are the main goals underlying decisions to amend existing laws, introduce new laws, or implement non-legal protections. These policy objectives may also relate to the management plan or the whole framework of protection including legal and non-legal measures.

Policy objectives can be general and apply to many individual circumstances. For instance, a policy objective might be to promote sustainable economic development. However, given the enormous cultural diversity of Indigenous and Local Communities, policy objectives can also be very specific to place and people, and be influenced by local customary law norms.

It is also likely that government will have different policy objectives according to whether the subject matter is GR, TK or TCE. Consequently, different legal and non-legal tools may be used for the protection of each. Ultimately, the form of cultural expression, and subsequently the outcome that is desired, will determine the measure which is best suited to its protection.

It is important to compare proposed measures to the policy objectives.

Example: Matching measures to policy objectives

In Australia, the Victorian Aboriginal Heritage Council implemented the *Our Places Our Names – Waterways Naming Project*, under which Traditional Owners are encouraged to apply to the relevant naming authority to change the registered name of a waterway and to name currently unnamed waterways in the state of Victoria. The policy objectives of this project include decolonising the landscape, giving waterways their true names, and raising awareness and understanding of Aboriginal culture in the wider community.⁵⁶

These policy objectives can be compared to the policy objectives of another Australian example, again involving use of aboriginal languages. In Australia there are more 250 Aboriginal and Torres Strait Islander language groups, and 800 dialects.⁵⁷ The Australian Government provides funding to indigenous language centres, across Australia, through its Indigenous Languages and Arts

⁵² Ibid.

⁵³ Ibid.

⁵⁴ United Nations Department of Economic and Social Affairs, *The 17 Goals*, <<https://sdgs.un.org/goals>>.

⁵⁵ *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, 70th sess, UN Doc A/RES/70/1 (25 September 2015) goal 2 & 2.5 (available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).

⁵⁶ Victorian Aboriginal Heritage Council, *Our Places Our Names Waterways Naming Project* (May 2020) <<https://www.aboriginalheritagecouncil.vic.gov.au/our-places-our-names-waterways-naming-project>>.

⁵⁷ Australian Institute of Aboriginal and Torres Strait Islander Studies, Living Languages, AIATSIS Website, <<https://aiatsis.gov.au/explore/living-languages>>.

Program. First Languages Australia supports the network of language centres, taking a leading role to promote Indigenous Australian languages.

Many indigenous language centres offer language request services. Applicants can apply to the language centres requesting translation or use of language words. A common example might be a non-Aboriginal company requesting permission to use a language word to name a meeting room. The company may want to use the name to acknowledge and pay respects to Traditional Owners of the country their office is built on. The language request services acknowledge Traditional Owners as the rightsholders of their cultural property and it offers income to language centres from the fees charged. These fees can be reinvested into the language centre and used for language revitalisation work, thereby achieving cultural preservation outcomes as well.⁵⁸

Both of examples above focus on policy objectives that are concerned with promoting positive behaviours and outcomes. Alternatively, policy objectives can be to discourage or prevent undesirable behaviours, including misappropriation, bio-piracy, and cultural harm.

Example: Criminal sanctions for cultural misappropriation

In the United States, cultural misappropriation of Native American arts and crafts can incur criminal penalties. The Indian Arts and Crafts Board works with the Department of the Interior to enforce prohibitions against counterfeit Native American Arts and Crafts. The policy objective underlying those laws could be said to be prevention of unjust and unfair enrichment of unethical producers misappropriating culture and denying Native American producers' opportunities for their own economic empowerment.⁵⁹

3.2. What are the policy objectives of AANZFTA Parties?

In the GRTKTCE Survey, we asked the AANZFTA Parties what their policy objectives were. Some of the key emerging policy objectives are outlined in Table 1.

Table 1: Common policy objectives for the AANZFTA Parties

To support Indigenous and Local Communities to protect and commercialise their TK	Establishment of effective free, prior, informed consent obligations for access to GR, TK and TCE
Equitable access and benefit sharing agreements to be standard best practice whenever GR, TK and TCE is accessed and commercialised	Protection, promotion and preservation of GR, TK and TCE

⁵⁸ Terri Janke, Laura Curtis and Ruby Langton-Batty, *First Languages, Law and Governance Guide* (Report commissioned by the Department of Communications and the Arts, 2002) p 72 (available at <https://www.terrijanke.com.au/first-languages-law-governance-guide>).

⁵⁹ Rebecca Tushnet, 'The Indian Arts and Crafts Act: the limits of trade mark analogies', in Matthew Rimmer, (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015), pp 250 – 263.

Effective enforcement of existing rights over GR, TK and TCE, particularly through intellectual property law	Prevention of misuse and misappropriation of GR, TK and TCE
Protection of confidential information relating to GR, TK and TCE & enforcement of cultural protocols about restriction of access to secret and sacred materials	Address challenges of enforcing laws regionally and internationally

Throughout several of the GRTKTCE Survey responses, respondents also explained that further discussion of the policy objectives is necessary. In some instances, this may reflect that Parties are still in the early stages of advocacy for GR, TK and TCE. More importantly, it also reflected the collaborative nature of policy development. Many of the respondents were members of the government, and did not identify as a member of an Indigenous or Local Community. Therefore, it is very reasonable that respondents saw the necessity of consulting with Indigenous and Local Communities in more depth in order to develop policy objectives that genuinely met community needs.

Much of the academic literature talks about policy objectives being *either* safeguarding *or* promotion, or defensive *rather than* positive (see Figure 1).

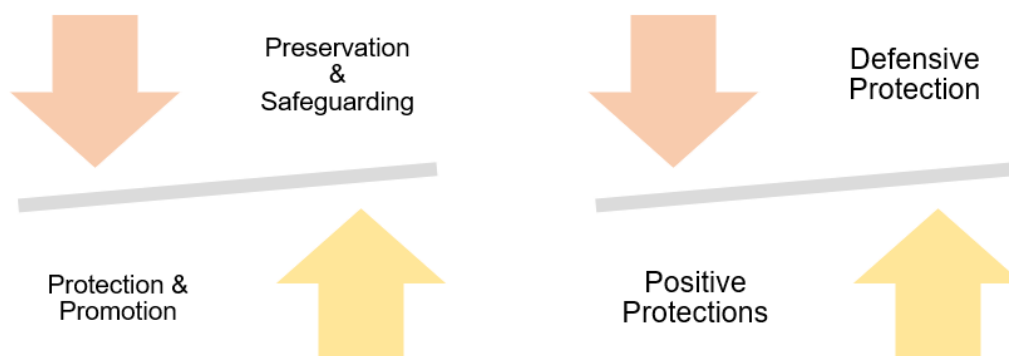


Figure 1: Balancing approaches when developing policy objectives

The remainder of this section will explain what is meant by these terms and how that can impact the development of policy objectives.

3.3. Preservation & Safeguarding: Protection & Promotion

What is the difference between safeguarding and promotion?

Preservation, otherwise referred to as safeguarding, is focused on identification and documentation of traditional cultural expression or traditional knowledge.⁶⁰ Policy objectives that aim to preserve or safeguard TK often focuses on the ongoing use and development of culture by current generations and transmission to future generations. As such, programs based on these policy objectives generally involve documenting, disseminating, revitalising and repatriating TK.⁶¹ A common measure used for this purpose is the creation and maintenance of databases and registers. However, documenting TK and TCEs should not be regarded as a protection measure of itself but part of a broader strategy. Databases are discussed further throughout this Study.

Case Study: Registration of intangible cultural heritage

In Victoria, Australia, the *Aboriginal Heritage Act 2006* (Vic) was amended in 2016 to provide for registration of Aboriginal intangible heritage on the Victorian Aboriginal Heritage Register.⁶² Traditional owners or Registered Aboriginal Parties may apply for registration of intangible heritage that is not widely known to the public. Once the intangible heritage or knowledge is on the Register, it cannot be used for a commercial purpose without entering into an Aboriginal intangible heritage agreement with the registered owner. Knowingly exploiting registered heritage for commercial purposes without consent is an offence, and reckless use of registered intangible heritage is prohibited.⁶³ There is to date only one item on the register, as a significant drawback is that knowledge widely known to the public cannot be registered.⁶⁴

Protection and promotion slightly differ from preservation and safeguarding. Programs based on the protection and promotion of TK generally focus on ensuring that the cultural expression or knowledge is not misappropriated or taken and used by a third party without authorisation.⁶⁵ In

⁶⁰ Kariodimedjo, Dina W. 'Safeguarding Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the Association of Southeast Asian Nations (ASEAN)', (2019) *EAI* 1 (available at <http://dx.doi.org/10.4108/eai.10-9-2019.2289413>).

⁶¹ WIPO, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions' (Background Brief No. 9, WIPO 2016) <<https://www.wipo.int/publications/en/details.jsp?id=3878>>.

⁶² *Aboriginal Heritage Act 2006* (VIC) pt 5A, ss 79A – 79L; See also Matthew Storey, 'Tangible Progress in the Protection of Intangible Cultural Heritage in Victoria?', *Australian Indigenous Law Review*, 2017, 108-110 (available at <http://www.austlii.edu.au/au/journals/AILRev/2017/5.pdf>).

⁶³ *Aboriginal Heritage Act 2006* (VIC) pt 5A, s 79G; Janke, Terri 'Protecting Indigenous cultural expressions in Australia and New Zealand: Two decades after the 'Mataatua Declaration and our culture, our future report' (2018) 114 *Journal of the Intellectual Property Society of Australia and New Zealand*, 21 (available at <https://search.informit.org/doi/10.3316/informit.204204436835200>).

⁶⁴ 'Taking Care of Culture' (Discussion Paper for the State of Victoria's Aboriginal Cultural Heritage Report, Victorian Aboriginal Heritage Council, November 2020) (available at https://content.vic.gov.au/sites/default/files/2021-01/Taking%20Care%20of%20Culture%20Discussion%20Paper_04012021_2.pdf).

⁶⁵ Molly Torsen and Jane Anderson WIPO, *Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Museums, Libraries and Archives*, WIPO, 2010, https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf

this context, databases may not be suitable as they may make protection more difficult because they make knowledge more easily accessible, especially when there are no access controls.⁶⁶

Does promotion of TK undermine its protection?

Promotion and protection are not necessarily mutually exclusive goals. Objectives for legal and policy approaches may include elements of both promotion and protection. For example, a database may be used to help patent examiners determine if a potential patent meets the novelty requirements.

Example: India's Traditional Knowledge Digital Library

An example of an approach combining promotion and protection objectives is India's Traditional Knowledge Digital Library (TKDL). The TKDL was established in 2001 to assist patent examiners when carrying out art searches in patent applications.⁶⁷ The idea behind the TKDL came from India's attempts to revoke patents granted by the US Patent and Trade mark Office over the wound healing properties of turmeric (referred to in Section 2.2), as well as patents granted by the European Patent Office on the antifungal properties of neem.⁶⁸ Upon establishment, it was estimated that around 2,000 patents relating to Indian medicinal systems were being granted by patent offices around the world every year.⁶⁹ In essence, this meant that people were having their knowledge wrongfully taken from them. Further, because the patents conferred exclusive rights on their owner, many Indian producers lost their freedom to operate in foreign markets.⁷⁰

In response, the TKDL has converted ancient texts on Indian Systems of Medicines into multiple languages, including English, Japanese, French, German and Spanish.⁷¹ This includes IP Australia who had access since January 2011.⁷² Access to the TKDL is subject to non-disclosure conditions to ensure on-going confidentiality of the information, highlighting the effective incorporation of protection and promotion principles.⁷³ So far more than 230 patent applications have either been set aside, withdrawn or amended based on the prior art evidence present in the TKDL database without any cost and within a few weeks or months.⁷⁴ This a substantial cost and time difference in comparison to post-grant opposition of patents.⁷⁵

⁶⁶ Ibid.

⁶⁷ Traditional Knowledge Digital Library Unit *Traditional Knowledge Digital Library* <<http://www.tkdل.res.in/tkdل/langdefault/common/Home.asp?GL=Eng#>>.

⁶⁸ WIPO Magazine, *Protecting India's Traditional Knowledge* (June 2011) WIPO <https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html>.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ WIPO, *About the Traditional Knowledge Digital Library* <https://www.wipo.int/meetings/en/2011/wipo_tkdل_del_11/about_tkdل.html>.

⁷² Ibid.

⁷³ Saikat Sen and Raja Chakraborty 'Traditional Knowledge Digital Library: a Distinctive Approach to Protect and Promote Indian Indigenous Medicinal Treasure' (2014) 106(10) *Current Science Association*, 1340, 1340–1343 (available at www.jstor.org/stable/24102476).

⁷⁴ Traditional Knowledge Digital Database, *About TKDL*, <<http://www.tkdل.res.in/tkdل/langdefault/common/Abouttkdل.asp?GL=Eng>>.

⁷⁵ Ibid.

3.4. Defensive Protections: Positive Protections

Defensive protections focus on acquiring or maintaining rights, including intellectual property rights, and limiting illegitimate acquisition or use by third parties who are not custodians of the knowledge.⁷⁶ The Indian TKDL could be seen as such a defensive protection due to its prevention of erroneous registration of patents by making patent examiners aware of the TK as "prior art".

In comparison, positive protections refer to the granting of rights over GR, TK and TCE that empower Indigenous and Local Communities to promote their cultural knowledge and resources and control the use of such knowledge and resources by third parties.⁷⁷ Positive protections also give rightsholders a way of using knowledge and resources for commercial gain through licensing or as a contribution to economic development.⁷⁸ An example of a positive protection is Geographic Indications, or "appellations of origin", which identifies a product as originating from a particular place or area. Well-known geographic indications include those for Champagne, Roquefort cheese, and Pingu peaches from Beijing, China.

Example: Geographic indications as positive protection

The Indigenous peoples of the Olinala region in State of Guerrero Mexico make intricately carved, painted and lacquered wood products.⁷⁹ In 1993, a cooperative comprised of Olinala craftsmen and women was established to protect their products as an appellation of origin. The appellation established strict standards of quality and procedures of production of Olinala products such as chests and crates made of wood in the local tradition which involves wood from Aloe tree, and a lacquering process using raw materials such as insect fats and mineral powders.⁸⁰ This appellation was registered under the International System of Appellations of Origin, under the Lisbon Agreement.⁸¹ Consequently, the geographic indication is afforded protection in 30 contracting parties to the Agreement.⁸²

3.5. Emerging issue: Data Sovereignty

Data sovereignty refers to the:

*inalienable rights and interests of indigenous peoples relating to the collection, ownership and application of data about their people, lifeways and territories.*⁸³

⁷⁶ WIPO, 'Intellectual Property and Genetic Resource, Traditional Knowledge and Traditional Cultural Expressions' (Booklet, WIPO, 2020) p 22 (available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf).

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ *Folk Art and the Opportunities of the Modern World* (23 December 2014) WIPO <<https://www.wipo.int/ipadvantage/en/details.jsp?id=3495>>.

⁸⁰ Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar Publishing, 2010) p 168 (available at <https://www.e-elgar.com/shop/gbp/intellectual-property-and-traditional-cultural-expressions-9781848444065.html>).

⁸¹ See WIPO Lisbon Express Database – Number 732, 9 March 1995, Publication No 24/1996 (available at <https://www.wipo.int/cgi-lis/ifech5?ENG+LISBON+17-00+21631562-KEY+256+0+732+F-ENG+1+1+1+25+SEP-0/HITNUM.NO,APP-ENG,COO+olinala>).

⁸² WIPO Lex, *WIPO-Administered Treaties*, WIPO IP Portal <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=10>.

⁸³ Tahu Kukutai and Taylor John (eds), *Indigenous Data Sovereignty: towards an agenda* (ANU Press, 2016) 1, 2 (available at <https://press-files.anu.edu.au/downloads/press/n2140/pdf/book.pdf>).

It is likely that the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) also has implications for Indigenous data sovereignty, especially in relation to the collection and ownership of data.⁸⁴

Given recent and rapid technological updates, questions of data sovereignty have emerged. Currently, this area of study is still in its early stages. Nevertheless, it is clear that issues of data sovereignty are very relevant to protective measures for GR, TK and TCE because any measure will inevitably lead to the collection and used of massive amounts of data, probably by governments and companies.

Case Study: Te Mana Raraunga – Māori Data Sovereignty Network Charter

New Zealand has Te Mana Raraunga, the Māori data sovereignty network. Te Mana Raraunga advocates for Māori rights and interests in data.⁸⁵ The organisation has published the *Te Mana Raraunga – Māori Data Sovereignty Network Charter*.⁸⁶ The Charter identifies Māori data as living tāonga (treasure) and defines Māori data as data produced by Māori or about Māori and the environments they have relationships with.⁸⁷ The Charter further asserts that Māori data should be subject to Māori governance.⁸⁸

This area of data sovereignty will be an area to pay close attention to when considering legal and non-legal mechanisms to improve protections for GR, TK and TCE.

4. Legal Approaches

Legal approaches to the protection of GR, TK and TCE have typically taken one of the following approaches:

- use of existing Intellectual Property Rights (**IPR**) laws to recognise proprietary rights of Indigenous and Local Communities over their GR, TK and TCE;
- amendment of existing intellectual property laws to extend existing IPR protections and redress some of the gaps left by conventional intellectual property law; or
- use of non-IPR laws aimed at the protection of cultural and individual rights that directly or indirectly impact the protection of GR, TK and TCE.

This section examines these approaches in more detail. Section 4.3 looks at how IPR laws have been used and amended so that they better reflect ownership by Indigenous and Local Communities over their cultural property.

⁸⁴ Ibid 13.

⁸⁵ Māori Data Sovereignty Network, *Home: Our Data, Our Sovereignty, Our Future*, <<https://www.temanararaunga.maori.nz/>>.

⁸⁶ Māori Data Sovereignty Network, 'Te Mana Raraunga – Māori Data Sovereignty Network Charter' (Charter, Māori Data Sovereignty Network) <<https://static1.squarespace.com/static/58e9b10f9de4bb8d1fb5ebbc/t/5913020d15cf7dde1df34482/1494417935052/Te+Mana+Raraunga+Charter+%28Final+%26+Approved%29.pdf>>.

⁸⁷ Ibid preamble.

⁸⁸ Ibid preamble.

The next part considers non-IPR laws that protect cultural and individual rights within existing legal regimes, for example consumer laws, or biodiversity laws. The laws may directly or indirectly impact GR, TK and TCE. These laws are considered in Section 4.2.

Sui generis laws, by their nature impact GR, TK and TCE directly. They may be in stand alone acts, or form part of an amendment to an existing law. In Section 4.3 we look more closely at legal approaches to safeguarding cultural heritage through *sui generis* laws.

This part then concludes with an examination of international co-operation (Section 4.4). This section is relevant because misappropriation of GR, TK and TCE often happens over state boundaries making regional and international co-operation essential to the protection and ethical commercialisation of GR, TK and TCE.

Administrative Orders & Regulations

We note that in some instances administrative orders and regulations can be seen as non-legal options. This is likely because, depending on a country's legal system, they can be quicker and easier to implement because they do not need to go through the usual legal and political machinery that new legislation does. In fact, administrative orders and regulations are a form a subordinate legislation. Subordinate legislation refers to a legislative instrument made by an entity under a power delegated to that entity by Parliament. For this reason, we have included discussions of administrative orders and regulations within our discussion of legal options.

4.1. The Strengths and Challenges of IPR laws

4.1.1. The main weaknesses of IPR laws

IPR and GR, TK, TCE are fundamentally different

Before analysing the advantages and disadvantages of IPR approaches to GR, TK and TCE, it is relevant to consider the fundamental differences between the two.

In general, IPR laws emphasise material form, and focus on protecting an individual's economic rights. Given their economic aspect, it follows that they are easily transferrable. For example, an artist may assign the copyright in their work to a buyer for a fee. Or an employee may assign the IP rights in their work to their employer in exchange for their salary.

This approach to creative output is quite different from the lived experience of cultural practice. Culture and cultural practices have a far more holistic approach to ways of being and knowing the world. It is not divided up into tangible and intangible, nor is it clearly divisible into IP categories of copyright, trademarks and patents. Rights and responsibilities to culture are perpetual and often shared amongst community members.

Copyright law, for example, protects expressions and not styles or ideas. Importantly, language is not protected by copyright. While a written language resource like a dictionary or word list may be protected under copyright, the actual language is not. There is no limitation on people using the words in a culturally inappropriate manner or misappropriating language words for financial gain.

The following sections briefly summarise the main failings of IPR laws in the protection of GR, TK and TCE.

Copyright often fails to protect TCE

Sometimes cultural expressions can draw on very old ideas and designs that have been passed down through many generations. Copyright law's requirement of originality, can therefore become a hurdle for copyright protection.

In 1993, the Federal Court of Australia heard *Milpururru v Indofurn Pty Ltd*.⁸⁹ This case is often referred to as the "Carpets Case". Three Aboriginal artists bought a case against a carpet producing company. The company had reproduced the works of fellow artists (now deceased) onto carpets, and then imported them and sold them in Australia. The carpet producers tried to argue that because the images were drawn from very old traditional knowledge, the works were not original and therefore could not be copyright protected. The Court did not accept this argument and found that the artists' works had great detail and complexity, which reflected skill and originality. The originality requirements were satisfied even though the design was pre-existing. The damages awarded to the artists included compensation for the personal hurt and cultural harm caused by the infringement.

Copyright gives rights to authors, who are individuals, and who are identified and known. The authorship provisions do not recognise the rights of a tribal, clan or community group. The closest copyright laws come to recognising shared ownership rights is through provisions relating to joint ownership. For example, in Australia a "work of joint ownership" means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors".⁹⁰ In Australia, this is insufficient recognition of communal rights and responsibilities to cultural expression.

To illustrate, in Australia, in 1998, there was a case: *Bulun Bulun v R&T Textiles Pty Ltd [1998] FCA 1082*.⁹¹ Mr John Bulun Bulun used imagery sacred to his clan, the Ganalbingu people, in his bark painting. His use of the sacred imagery was consistent with his cultural responsibilities. However, a textiles manufacturer saw an image of Mr Bulun Bulun's work and copied it onto their textiles. This was an evident breach of both copyright and customary law. In his judgement, Von Doussa J recognised Mr Bulun Bulun's ongoing cultural responsibilities with regard to the use of the imagery, and recognised that those duties formed grounds for a fiduciary relationship between Mr Bulun Bulun and his clan. In this context, the important point is that, because it was a copyright breach, Mr Bulun Bulun had a right of action against the textile manufacturer. But the clan Elders, would not have had the same rights – despite their cultural ownership of the imagery. The extent of their right was that Mr Bulun Bulun owed them a duty of care. This case illustrates that copyright law does not recognise communal ownership.

⁸⁹ *Milpururru and Others v Indofurn Pty Ltd and Others* [1994] 130 Australian Law Reports 659.

⁹⁰ *Copyright Act 1968* (Commonwealth of Australia) s 10.

⁹¹ *Bulun Bulun and another v R&T Textiles Pty Ltd* [1998] FCA 1082; *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 Intellectual Property Review 513.

Case Study: Clothing designer, Max Mara, accused of plagiarism

This case study was referred to in the Consultative Workshop.⁹² In 2019, the Traditional Arts and Ethnology Centre in Lao PDR accused clothing brand Max Mara of plagiarism. The Italian fashion business allegedly copied the designs used by the Oma people, an ethnic group from the mountainous north and north-east of Lao PDR. This was done without consent, there was no attribution, and no benefit sharing. It raised issues of cultural offensiveness and disrespect. The designs are passed down through ancestors, and have cultural importance, including for funeral rites. The designs are intricately embroidered and appliqued. The Max Mara designs are mass produced and printed. It also raised issues of economic disempowerment: the Oma people generate income from their work.⁹³

To the author's knowledge, no further legal action was taken, so the question of whether it could be established as a copyright infringement remained untested. Instead, the Centre appealed to public opinion to bring pressure on Max Mara to improve their practices.

Case Study: Counterfeit fabrics impact earning of Cordillera weavers in Baguio City, the Philippines

During the Consultative Workshop, a delegate from the Philippines, drew our attention to a recent spate of fake Cordillera fabrics.⁹⁴ At the beginning of 2021 the counterfeit fabrics, produced in China were, being sold by retailers in the Philippines. The counterfeits are in the style of Cordillera weaving. The genuine products are hand woven, but the replicas are of sub-standard fabric and machine produced. The Easter Weaving Room is one of the small corporations founded by genuine producers. It pays 100 women at a rate above minimum wage. The women are able to make commissioned work at home. However, the counterfeits flooding the market have reduced demand for the genuine product, and negatively impacted the Easter Weaving Room and other organisations like it.⁹⁵

In fact, Baguio is one of the country's first cities to be recognised for its economic contribution through its folk arts and crafts and in 2017 Baguio was invited to join UNESCO's Creative Cities Network, in part due to the weaving practiced in the city. The inauthentic products like this recent counterfeit may contribute to undermining the economic and cultural impact.⁹⁶

Other copyright law limitations have also been reported by the AANZFTA parties. For example, New Zealand reported that the Waitangi Tribunal's report *Ko Aotearoa Tēnei* identified the

⁹² Discussion from Saybandith Sayavongkhamdy, Director of Policy and International affairs division from Department of Intellectual Property, Consultative Workshop, day 1.

⁹³ Ryan General, *Fashion Label Max Mara Blasted For Blatantly Ripping Off Ethnic Laotian Designs* (10 April 2019) <<https://nextshark.com/max-mara-plagiarism-laotian-design/>>.

⁹⁴ Ms Rizzabel a. Madangeng, Attorney IV at National Commission on Indigenous Peoples, the Philippines, Consultative Workshop on Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (GRTKTCE) Policy Considerations, Workshop 1, 29-30 April 20201) (Comment).

⁹⁵ Phillipine Daily Inquirer, *Cordillera weavers seek protection vs fake fabrics* (29 January 2021) INQUIER.NET <<https://newsinfo.inquirer.net/1389488/cordillera-weavers-seek-protection-vs-fake-fabrics>>.

⁹⁶ Ibid.

material form requirements as a hurdle to protection of TCE.⁹⁷ Oral traditions, including whakapapa (genealogy), traditional korero (formal speakmaking) or mōteatea (traditional Māori chant or lament) will not qualify for copyright protection unless recorded in some physical form. Additionally, the limited duration of copyright is a further gap in TCE protection. In New Zealand kaitiaki (guardians/custodians) have perpetual relationships with taonga works.⁹⁸ This is true in Australia too – the rights of Aboriginal and Torres Strait Islander peoples over their Indigenous Cultural and Intellectual Property (ICIP) are perpetual, passed from generation to generation.

Patent law often overlooks GR and TK

To be patentable, an invention must be novel and inventive. Generally, an invention is compared against the prior art base to determine if it is novel and inventive. The most common difficulty patent law has in the protection of GR, TK and TCE is that these cultural practices and expressions, are generally invisible to patent examiners. This means that GR or TK belonging to traditional or local communities, may be registered to parties that don't actually have cultural rights to the GR or TK.

Case Study: Dr Abelardo Aguilar

US pharmaceutical company, Eli Lilly, profits from the antibiotic, erythromycin. However, the bacterium was originally isolated by Filipino scientist Dr Abelardo Aguilar in 1949. Neither Dr Aguilar nor the Philippines have received any royalties.⁹⁹

Case Study: the Gumby Gumby plant

In Australia, the Gumby Gumby plant has been used by the Ghungalu people in central Queensland as traditional medicine for thousands of years. However, a patent to produce leaf oil extracts from the plant, and use it in medicine was registered by a non-Indigenous company in 2008.¹⁰⁰

Note: Databases have been a popular attempt to put patent examiners on notice of GR and TK as part of the prior art base – these are discussed in subsequent sections that consider legal and non-legal responses to gaps in IPR laws.

Trademarks can protect TCEs used in business

Business owners can register trademarks as part of their business branding. A trade mark might be a word or a logo, or a combination of the two. Once registered, the owner has exclusive rights

⁹⁷ *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Waitangi Tribunal Report 2011).

⁹⁸ Feedback from New Zealand delegate to AANZFTA Committee on Intellectual Property (IPC) via email 29 July 2021.

⁹⁹ Intellectual Property Office of the Philippines, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Philippines Survey).

¹⁰⁰ Patent Application Number 2008300612; Production of leaf extracts of *Pittosporum phillyraeoides* and the use thereof in medicine; inventor: Von Gliszczynski, Klaus-Otto and Amato, Katja. Filing date 2008-09-15; Application Details: 2008300612 (22 August 2021) IP Australia <<http://pericles.ipaustralia.gov.au/ols/auspat/applicationDetails.do?applicationNo=2008300612>>.

to use that mark. TCE may be expressed in a trademark in a number of ways, for example, the word might be a word from an Indigenous or local language.¹⁰¹ If not actually a foreign word, it might be a word that in colloquial use, is closely linked to a particular Indigenous or Local Community.¹⁰² In Australia, the word “Deadly” is often used by members of the Aboriginal or Torres Strait Islander community to mean “cool”, or “really good”. So a word mark that incorporates “Deadly” may give the impression that the business that uses it, is Aboriginal or Torres Strait Islander owned.

A trademark can also be design or image that has its origins in Indigenous or Local Community TK.¹⁰³

Many trademark regimes have provisions that prevent a mark from being registered if it is considered scandalous or offensive. However, scandalous and offensive is a high threshold. In Australia, trademarks that are scandalous cannot be registered. There could be culturally inappropriate uses that don't meet the threshold of “scandalous”.¹⁰⁴ In addition, the trademark examiner might not have the cultural knowledge to recognise when a proposed mark is scandalous or offensive (or culturally inappropriate).¹⁰⁵ For example, an indigenous design might have an underlying meaning, unknown to the examiner, but would be scandalous or offensive when used by the applicant in their business.¹⁰⁶

Design laws don't recognise traditional designs

A design must be new and original in order to be registered. This means that a lot of traditional designs, drawn from TK or TCE, are not registrable because they do not meet the requirement of being ‘new’. Additionally, the purpose of design law is to protect the appearance of a mass-produced product and is generally used by a creator when they plan to make multiple copies of their product.

¹⁰¹ Terri Janke, Maiko Sentina and Elizabeth Mason ‘Legal protection of Indigenous ‘Knowledge in Australia’ (Supplementary Paper, IP Australia & Department of Industry, Innovation and Science, 2018) p 19 (available at https://www.ipaustralia.gov.au/sites/default/files/supp_paper_1_legal_protection_in_australia_28mar2018.pdf).

¹⁰² Terri Janke ‘Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions’ (Research Report No 1, WIPO, 2003) (available at https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf).

¹⁰³ See the Wandjina Trade mark for example owned by the Kimberley Aboriginal Law and Cultural Centre; IP Australia, 1454268 & 1454269 – Woman’s Head, Stylised & Wandjina (29 September 2016) <<https://www.ipaustralia.gov.au/about-us/accountability-and-reporting/freedom-of-information/foi-disclosure-log/1454268-1454269>>.

¹⁰⁴ Fady JG Aoun, ‘Whitewashing Australia's History of Stigmatising Trade Marks and Commercial Imagery’ (2019) *Melbourne University Law Review* 19; (2019) 42(3) *Melbourne University Law Review* 671 (available at <http://classic.austlii.edu.au/au/journals/MelbULawRw/2019/19.html>).

¹⁰⁵ *Ibid.*

¹⁰⁶ Dr Terri Janke and Laura Curtis, ‘Indigenous Protocols and Processes of Consent relevant to Trade Marks’ (Discussion Paper, IP Australia, 2020) (available at https://www.ipaustralia.gov.au/sites/default/files/indigenous-protocols-and_processes-of-consent-relevant-to-trade-marks.pdf).

This brief summary of the failings of IPR laws to protect GR, TK and TCE leads us to an analysis of how amendments to IPR laws have tried to redress some of these failings. Some have had greater success than others.

4.1.2. Can copyright law protect TCE?

Countries have taken several approaches to extending copyright law to better protect Indigenous and Local Community rights to TCE.

Some countries have attempted to vest TCE (sometimes referred to as folklore in this context) in a competent authority.

This approach reflected the guidance of the *Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)*. While it did not use the word 'folklore' (and it was written before TCE was in common use), it nevertheless had folklore in mind when they referred to works of an unknown author:

In a 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 [Berne Convention country], it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the [Berne Convention country]¹⁰⁷

This article can be read with article 2 of the Convention that leaves it to the individual countries whether to include a material form requirement in their copyright act to mean that the Convention recommended rights to intangible folklore should be vested with a 'competent authority'.

The Tunis Model law followed this same approach. In this Model Law, the economic and moral rights of works of national folklore are to be exercised by a competent authority.¹⁰⁸ As to the material requirement, the Model Law offers two alternatives:

- that protection is afforded without any formality, or,
- that folklore is excepted from the material form requirement.¹⁰⁹

This approach has been used in a number of countries including The Kingdom of Bahrain, Saint Kitts and Nevis and Sierra Leone.¹¹⁰ In all three countries, folklore is owned by the Crown. It should be noted that this is not the requirement of the Berne Convention or in the Tunis Model Law. While a 'competent authority' could be a government department, it could also be an independent representative body designated by the government.

¹⁰⁷ *Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)*, opened for signature 31 January 1972 (entered into force 19 November 1984) art 15(4)(a).

¹⁰⁸ *Tunis Model Law on Copyright for developing countries (1976)* s 6.

¹⁰⁹ *Ibid* s 1(5).

¹¹⁰ *Law No 22 of 2006 on the Protection of Copyright and Neighbouring Rights*, The Kingdom of Bahrain, Article 69; *Copyright Act 2000* (Saint Kitts and Nevis) s 22(5); *Copyright Act 2011* (Sierra Leone) s 26.

Case Study: Copyright law in Indonesia

Indonesia has used their copyright legislation to protect TCEs and works. The Act deems that the copyright of TCEs is held by the State, who is obligated to take inventory, preserve and maintain the TCEs.¹¹¹ The rights endure indefinitely.¹¹²

Case Study: Copyright law in Viet Nam

In Viet Nam folklore is recognised in laws relating to copyright. For example, “folklore and folk art works of folk culture” are specifically identified as works eligible for copyright protection. Folklore is recognised as collective creations and include tales, songs, dances, rites and games.¹¹³ Organisations and individuals using folklore and folk art works of folklore must refer to their sources and preserve their true values.¹¹⁴ In 2011, a Government Decree further clarified the operation of the law, extending the scope of folk, literary and artistic works to include other forms of art and performance including reformed opera (cai luong), village festival, folk games and plastic arts.¹¹⁵

One challenge with this approach is that it does not allow for the diversity of Indigenous and Local Communities within a country. Vesting ownership of folklore with a state authority is already inherently problematic because it potentially removes control of TK and TCE from the community and replaces the state as its primary authority.

Case Study: A general prohibition on unauthorised use of copyright material

Papua New Guinea has taken a different approach. They have not followed the model of vesting ownership with a competent authority and instead have tackled the issue of communally owned TK by placing a general prohibition on unauthorised reproduction, communication to the public, and adaptation. Exceptions to this prohibition include personal use, scientific research, and traditional or customary context.¹¹⁶ This means that most of the time, use of TK & TCE (although the act refers to it as “expressions of folklore”) cannot be used without permission, outside the traditional or customary context. However, the scientific research exception, which is actually phrased as “face to face teaching and scientific research” is potentially a very large exception.¹¹⁷

4.1.3. Can disclosure requirements prevent erroneous grant of rights to GR & TK?

In general, registration of a patent has two requirements: novelty and inventive step. Whether something is considered novel and inventive is generally assessed by patent examiners by comparing the patent application to the prior art base. The common issue in these circumstances,

¹¹¹ *Law of the Republic of Indonesia Number 28 of 2014 on Copyrights*, Art 38(1)-(2).

¹¹² *Ibid* Art 60(1).

¹¹³ *Law on Intellectual Property 2005 (No 50/2005/QH11)* art 23 (1).

¹¹⁴ *Ibid* art 23(2).

¹¹⁵ *Decree amending and supplementing a number of articles of the government's decree No 100/2006/ND-CP of September 21 2006, detailing and guiding a number of articles of the civil code and the intellectual property law regarding copyright and related rights*, (Hanoi) No. 85/2011/ND-CP, art 4.

¹¹⁶ *Copyrights and Neighbouring Rights Act 2000* (Papua New Guinea) s 30.

¹¹⁷ *Copyrights and Neighbouring Rights Act 2000* (Papua New Guinea) s 30(2)(c).

is that GR and TK belonging to Indigenous and Local Communities are often not recognized as part of the prior art base.

A number of countries have already implemented disclosure requirements. In Switzerland for example, a patent application must contain information on the source of TK or GR to which the inventor had access, provided the invention is directly based on this knowledge.¹¹⁸ If the source is unknown the applicant must confirm this in writing, and wilful false information will incur a fine.¹¹⁹

The Indian patent law goes even further, stating that an invention which is TK is not an invention.¹²⁰ India's patent law works in conjunction with the Indian Traditional Knowledge Digital Library (TKDL), discussed further in Section 3.3. But relevantly, this database helps ensure that patent examiners can see TK and GR as part of the prior art base, and therefore not inadvertently deem something as novel and inventive, when in fact it is neither.

Patent disclosure requirements are a topic of discussion among the WIPO IGC. The reason people are interested in patent disclosure requirements is because they believe it will improve transparency of the patent system and monitor the contributions of TK to innovations. It is believed that this increased transparency will help ensure that TK is used with the permission of source countries and/or communities. In turn, this will lead to benefits returning to those countries/communities.¹²¹

As a result, patent disclosure laws generally include some form of obligation on the patent applicant to disclose the source and/or origin of GR and/or TK.¹²² Optionally, they may also require evidence of prior informed consent, and/or evidence of a benefits sharing agreement with the source country/community (alternately referred to as an agreement based on mutually agreed terms (MAT)).¹²³ Parties to these agreements may include gene banks, universities or private persons.¹²⁴

In 2020, the WIPO IGC published the second edition of *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Cultural Knowledge*.¹²⁵ This was an update to a 2004 technical study into the legal and operational questions that WIPO parties had identified in relation to patent disclosure requirements.

In 2013 Mr Ian Goss, Chair, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore drew on the first edition of that paper to

¹¹⁸ *Federal Law of June 25, 1954 on Patents for Inventions* (Switzerland) art 49a(1)(b).

¹¹⁹ *Ibid* 49a(2) & 81a.

¹²⁰ *Patent Act 1970* (India): Section 3 (p) of the Patents Act, clearly mentions that traditional knowledge shall not be considered as an invention or an innovative idea: Section 3 (p) of the Patents Act, clearly mentions that traditional knowledge shall not be considered as an invention or an innovative idea; Sonal Sodhani, *India: Traditional Knowledge and Patents* (30 May 2019) Mondaq <<https://www.mondaq.com/india/patent/810280/traditional-knowledge-and-patents>>.

¹²¹ World Intellectual Property Organization, *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge* (WIPO, Second ed, 2020).

¹²² *Ibid*, 11.

¹²³ *Ibid*, 11.

¹²⁴ *Ibid*, 11.

¹²⁵ *Ibid*, 8.

prepare a draft text of an international legal instrument on IP and GRs with associated TK. Mr Goss offered the draft to the WIPO IGC for consideration.¹²⁶

The objectives of the draft text were:

- To enhance the transparency of the patent system, and
- Prevent erroneous grant of rights for inventions that were not novel with regard to GRs and associated TK.¹²⁷

In the draft, the trigger for disclosure is when an invention is materially/directly based on associated TK. Failure to disclose should incur a sanction, but should not invalidate a patent.¹²⁸

For the purposes of the draft “*materially/directly based on means that GRs and/or associated TK must have been necessary or material to the development of the claimed invention, and that the claimed invention must depend on the specific properties of the GRs and/or associated TK.*”¹²⁹

Case Study: Disclosure of TK in application for rights, Myanmar & Viet Nam

Myanmar recently passed its first patent law. Under the Act, patent applicants must include a statement of legal use of TK underlying biological resources¹³⁰ Conversely, the applicant must disclose if the biological resources related to TK were used *without* consent.¹³¹

Viet Nam has similar provisions in which applicants for IP rights which relate to GR (or derivatives thereof) must state the source of origin of the genetic resources that are the subject matter of their application, and comply with profit sharing mechanisms set out in the Act.¹³² A circular supplementing the decree is discussed in Section 5.9. This approach is cross-referenced in their Law on Biodiversity.¹³³ Article 64 reads that “the State protects traditional knowledge copyrights on genetic resources and encourages and supports organisations and individuals to register traditional knowledge copyrights on genetic resources”.¹³⁴

¹²⁶ Goss, Ian ‘Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Generic Resources’, Prepared by Mr Ian Goss Chair, WIPO Intergovernmental Committee in Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (30 April 2013).

¹²⁷ Ibid, art 1.

¹²⁸ Ibid, art 3.2.

¹²⁹ Ibid, art 2.

¹³⁰ *Patent Law 2019*, s 20(b)(7).

¹³¹ Ibid s 22(c).

¹³² Intellectual Property Office of Viet Nam Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Viet Nam Survey); Decree 59/2017/ND-CP 2017 (Vietnam) Management access genetic resources benefit sharing arising utilization Article 14(3).

¹³³ *Law on Biodiversity 2008* (Socialist Republic of Vietnam) No. 2/2008/QH12.

¹³⁴ Ibid, art 64(1).

Case Study: Can cultural appropriateness be legislated for in trademark law?

New Zealand has been a leader in developments to trademark law to better protect Māori TK and TCE. Their legal amendments work hand-in-hand with their policy plans. Section 17 of their trademarks act reads that:

The [trademark] Commissioner must not register a trade mark or part of a trademark any matter...the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including the Māori community¹³⁵

New Zealand is not unique in prohibiting registration of a trademark that would cause offense or cultural harm to Indigenous and Local Communities.

For example, Vanuatu requires that any trademark application that involves an expression of Indigenous culture must be referred to the National Council of Chiefs. The Registrar must not register a trademark unless the custom owners have given their prior, informed consent, and the applicant and the custom owners have entered into an equitable benefit sharing agreement.¹³⁶

However, New Zealand has very actively used this law to develop policies and protocols that enhance the law's implementation (discussed further in Section 4).

4.1.4. Can trademark law be leveraged to protect TK and TCE?

In a number of countries, trademark law has been used to actively protect and promote TK and TCE. Trade marks – and in particular collective and certification marks – have been leveraged to protect and promote TK, TCE and potentially GR, in a number of ways:

- TK or TCE may be expressed in a registered mark; or
- A community or business may register a trademark as part of their branding strategy. As brand recognition increases, they are raising consumer awareness of their business. Their business may involve the practice of culture including use of TK and TCE. Depending on the nature of the business, they could be working with GR as well.

Using trademarks to protect your branding

Businesses owned and run by people from Indigenous and Local Communities can proactively use trade mark law to protect their branding. This is best practice in ethical commercialisation of GR, TK and TCE.

Malaysia has granted a trademark over an essential oil from Sarawak Litsea. The trademark is LitSara®.

¹³⁵ Ibid s 17.

¹³⁶ *Trade marks Act 2003* (Republic of Vanuatu) No.1 of 2013, pt 15, s 94.

Case Study: Sarawak Litsea & LitSara®

In 2005, researchers from the Sarawak Biodiversity Centre were working on the Centre's Traditional Knowledge Documentation Programme in Malaysia. During that Programme, they learned of the properties and uses of Sarawak Litsea from the Bidayuh, Kelabit and Lun Bawang communities.¹³⁷ Sarawak Litsea (*Litsea cubeba*) is a plant well known to the Bidayuh, Kelabit and Lun Bawang communities for its culinary and healing properties. Oil from the tree's leaves and fruit has antibacterial properties and is used in personal care products. With consent from the communities, the tree now has a GI, and the oil has a trademark – LitSara®. Five communities are now involved, with the Centre, in the sustainable harvesting of Sarawak Litsea and extraction of the oil with a view to commercialisation. There are plans for benefit sharing to ensure benefits flow back to the communities.¹³⁸

Collective marks and certification marks

Collective marks and certification marks are slightly different. In general, a collection of creators or business owners use a mark to differentiate the geographical source, quality of products, material of manufacture, or method of manufacture. So, if a creator is part of the collective, they are permitted to use the collective mark (which is generally registered as a trademark). For example, the logo for the Taita Basket collective is registered and owned by the Taita Basket Association in Kenya.¹³⁹

Case Study: The T'Nalak Tau Sebu collective mark in the Philippines

In 2017, the Intellectual Property Office of the Philippines registered a collective mark to T'Nalak Tau Sebu. The T'nalak Tau Sebu group is a federation of members and gets its name from the hand woven textiles (T'nalak) woven by the people of Lake Sebu. The fabrics are handwoven with intricate designs connected to the weaver's life, culture and tradition. The group has established a Code of Practice to guide group members to maintain the quality of the T'nalak fabrics and materials. Cloths can be submitted for assessment and issued with a quality seal. With the seal will come a serial number for traceability.¹⁴⁰ Application for a collective mark was

¹³⁷ Sarawak Biodiversity Centre, *The LitSara story from Traditional knowledge to Innovation*, (December 2016) <<https://www.sbc.org.my/sbc-news/downloads/publication/591-the-litsara-story-from-traditional-knowledge-to-innovation/file>> & Malaysia's survey.

¹³⁸ Ibid.

¹³⁹ Taita Basket Association (Kenya) and Sami Council (Norway), 'How to Protect and Promote Your Culture – Collective Marks and Certification Marks' (Speech delivered at the WIPO Webinar, 24 March 2021) (available at https://www.wipo.int/tk/en/news/tk/2021/news_0007.html https://www.wipo.int/meetings/en/details.jsp?meeting_id=63848) (WIPO Presentation).

¹⁴⁰ Intellectual Property Office of the Philippines, *IPOPHL Grants T'nalak Tau Sebu Collective Trade mark Registration*, Intellectual Property Office of the Philippines (24 July 2017) <<https://www.ipophil.gov.ph/news/ipophil-grants-tnalak-tau-sebu-collective-trademark-registration/>>; Intellectual Property Office of the Philippines, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Philippines Survey).

the community's response to similar, low quality cloths being produced and sold cheaply in nearby provinces.¹⁴¹

In comparison, a certification trademark, is generally owned by some kind of authoritative body. That body will then certify the quality of a creator's product. If the creator's good or service is deemed to meet the authority's standards they will licence the trademark to the creator.

Case Study: New Zealand *Toi Iho* Māori Made

The *Toi Iho* Māori Made Mark is a registered trade mark used to promote, and authenticate Māori arts and craft, made by Māori artists. It is currently managed by the *Toi Iho* Charitable Trust. As a certification mark, it guarantees that an artwork, or artefact is created by a person of Māori descent.¹⁴²

When the mark was initially established by the *Te Waka Toi* in 2002, the Māori arts board of Creative New Zealand, had five objectives:

1. Assist in the protection of intellectual and cultural property rights of Māori artists
2. Protect the integrity of Māori culture
3. Create a premium for Māori artworks
4. Provide direct economic benefits to artists registered to use the brand through increased consumer demand
5. Add value to the promotion of New Zealand/Aotearoa's cultural tourism strategy.¹⁴³

In addition to arts and crafts, it was used to authenticate exhibitions, performances and publications by Māori artists.¹⁴⁴

Case Study: National Indigenous Arts Advocacy Association Inc. and Label of Authenticity

The National Indigenous Arts Advocacy Association Inc. (NIAAA) were a national Indigenous arts and cultural service and advocacy association that operated in Australia until 2002.¹⁴⁵ The NIAAA established a Label of Authenticity and Collaboration Mark, registered under the *Trade Marks Act 1995* (Commonwealth of Australia). This Label of Authenticity was used within a system to authenticate arts and crafts produced by Aboriginal and Torres Strait Islanders and their licensees. The initiative ceased in 2002. To date the Label of Authenticity was the only mark of its kind in Australia and inspired the *Toi Iho* mark for Māori arts in New Zealand. The NIAAA Label of Authenticity is an example of how certification marks can protect appropriate reproductions of TCE and inform consumers of authentic works of TCE.

¹⁴¹ Intellectual Property Office of the Philippines, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Philippines Survey).

¹⁴² *About Toi Iho* *Toi Iho* Charitable Trust (10 May 2012) <<http://www.toiho.co.nz/about-toi-iho/>>.

¹⁴³ Te Manatū Taonga Ministry for Culture and Heritage *Submission to the Standing Committee on the Environment, Communications, Information technology and the Arts Inquiry into Indigenous Visual Arts and Crafts* (May 2007) 2.

¹⁴⁴ *Ibid*, 2.

¹⁴⁵ National Indigenous Arts Advocacy Association Inc., *About NIAAA*, Archived Website <://www.culture.com.au/exhibition/niaaa/about.htm>.

Case Study: Australia Supply Nation Certified and Registered Aboriginal Businesses

Supply Nation, formerly known as the Australian Indigenous Minority Supplier Council, is a not-for-profit Indigenous Organisation that works with Aboriginal and Torres Strait Islander Businesses, and non-Indigenous businesses, to support the Australian Indigenous business sector.¹⁴⁶ Supply Nation verifies businesses as Indigenous, with either 50% Indigenous ownership or 51%+ Indigenous ownership, management, and control. Businesses that are registered or certified with Supply Nation are given the ability to use a Certification trade mark to indicate to others in the market which category they fall under. The use of the Certification trade mark by Supply Nation guarantees that a business has met their requirements as an Indigenous business. Within Australia, Government Departments have a target per year to spend procuring from Indigenous businesses, this is also the case with many Government contracts given to private businesses. The Certification trade mark provides this guarantee to the market.

As a way of indicating that a business is Indigenous owned, the Certification trademarks can also be applied as part of their branding strategy, and is often used by artists to indicate to the market that, in the case of them being the sole owner of a company, their artwork is authentic. This trade mark is one of several used to certify Indigenous Businesses within Australia but it is the most prominent.

Case Study: Sámi Duodji

The Sámi Duodji trade mark is owned and managed by the Saami Council in Norway, although there are licensing offices in Finland, Sweden, Norway and Russia.

The Sámi people are indigenous to Norway, Sweden, Russia and Finland and have had a great many challenges with inauthentic Sámi arts and crafts on the market. Even consumers that had the intention of buying authentic Sámi arts and crafts could not distinguish between the real and fake. However, in the 1980s the Sámi introduced the Sámi Duodji certification mark. The Sámi Council allow Sámi creators to use the mark, and in that way distinguish themselves in the market.¹⁴⁷

Certification marks and collective marks have economic and social advantages for Indigenous and Local Communities. Both marks help distinguish authentic products from fakes in the market, and therefore have positive economic outcomes for authentic producers. These economic outcomes can have flow on effects. For example, where producers are typically women – as is the case in Taita basket weaving from Kenya – these economic advantages have empowered

¹⁴⁶ Supply Nation Website, www.supplynation.org.au/about-us/ c

¹⁴⁷ *Sámi Duodji and Sámi Made trade marks*, Saami Council <<https://www.saamicouncil.net/en/the-sami-duodji-certificate>>; Taita Basket Association (Kenya) and Sami Council (Norway), 'How to Protect and Promote Your Culture – Collective Marks and Certification Marks' (Speech delivered at the WIPO Webinar, 24 March 2021) (available at https://www.wipo.int/tk/en/news/tk/2021/news_0007.html https://www.wipo.int/meetings/en/details.jsp?meeting_id=63848)

women. The Taita Basket mark has reportedly helped improve the standard of living for women and their families and has reduced gender-based violence.¹⁴⁸

4.1.5. Are Geographic Indications a potential tool for GR, TK and TCE protection?

Geographic Indications (GI) refer to mechanisms that provide a way of indicating that a product comes from a specific place, and possesses specific qualities or reputations specific to that region.¹⁴⁹ In general, GIs work in conjunction with trademarks.

There are many well-known GIs, for example Champagne from the Champagne region of France, Gouda cheese from Holland, and Darjeeling Tea from India.

Trade marks can have a GI function. For example, the Sámi Duodji certification mark certifies that a product has its origin in that region of Scandinavia.

Some countries have standalone GI regimes. In which case, a GI can itself be registered.

Case Study: the Australian Register of Protected Geographic Indications and Other Terms

In Australia, the Register of Protected Geographic Indications and Other Terms is maintained by Wine Australia.¹⁵⁰ The Register includes geographic indications¹⁵¹ in relation to wines in Australia and in foreign countries.¹⁵² The boundaries of the geographic indications are divided into Wine Zones, Regions and Subregions. For example, the “Big Rivers” zone is located in the state of New South Wales. Within Big Rivers is a Region known as the “Riverina”. These registered Zones, Regions and Subregions are not themselves trademarks. However, the description and presentation of a wine is generally false or misleading, if it includes a registered GI but it did not originate from that place or if it is likely to mislead a consumer about the country, region or locality in which the wine originated.¹⁵³

¹⁴⁸ Kirui, Dominic, *How a Trade mark Helped women in Kenya make a Business from Baskets*, (16 April 2018) The New Humanitarian

<<https://deeply.thenewhumanitarian.org/womensadvancement/articles/2018/04/26/how-a-trademark-helped-women-in-kenya-make-a-business-from-baskets>>; Taita Basket Association (Kenya) and Sami Council (Norway), ‘How to Protect and Promote Your Culture – Collective Marks and Certification Marks’ (Speech delivered at the WIPO Webinar, 24 March 2021) (available at https://www.wipo.int/tk/en/news/tk/2021/news_0007.html https://www.wipo.int/meetings/en/details.jsp?meeting_id=63848).

¹⁴⁹ WIPO, *Geographical Indications* <https://www.wipo.int/geo_indications/en/>.

¹⁵⁰ *Wine Australia Act 2013* (Cth) s 40ZC.

¹⁵¹ Defined in s 4 of the *Wine Australia Act 2013* (Cth) as “*indication that identifies the goods as originating in a [country](#), or in a region or locality in that [country](#), where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin*”.

¹⁵² *Wine Australia Act 2013* (Cth) s 40ZD.

¹⁵³ Wine Australia, *Register and Protect GIs and Other Terms*, <<https://www.wineaustralia.com/labelling/register-of-protected-gis-and-other-terms>>.

Case Study: Sarawak Pepper in Malaysia

Sarawak Pepper originates from Sarawak. In fact, the region is responsible for 99% of Malaysia's pepper production, producing both black and white pepper. The Malaysian Pepper Board is the registered rights holder of a GI on the pepper, initially registered in 2003. Sarawak Pepper is exported all over the world. Trade marks have also been registered, based on this GI, for example SaraSpice®.¹⁵⁴

So, the answer to the question “*can GIs protect GR, TK and TCE?*”, is a qualified ‘yes’. GIs – either as an indirect function of a collective or certification mark or as *sui generis* legislation – can link products, or expressions to place. They also avoid some of the challenges involved in identifying a competent authority as the owner of the IP. During the Consultative Workshop, we received feedback from a delegate from Cambodia, on some of the significant advantages of GIs that would apply to the AANZFTA parties.¹⁵⁵ These advantages include:

- Preserving the environment and biodiversity
- Maintaining traditional farming with its potential positive contributions to the landscape, favourable habitats for biodiversity and soil preservation
- Maintaining traditional processing systems and recipes
- Keeping alive local tradition and local culture related to the product

The delegate noted the link between GI recognition and sustainability by contributing to the preservation of local natural resources. GIs encourage local development, and then in turn, promote prosperity in the community.¹⁵⁶

4.2. Safeguarding cultural heritage

Section 4.1 set out some of the challenges of conventional IPR laws in the protection of GR, TK and TCE. Amendments to conventional IPR laws have in general improved protections for GR, TK and TCE. Predictably, many of the greatest achievements of amended IPR laws have been to the protection of Indigenous and Local Communities rights when it comes to commercialisation of GR, TK and TCE. This makes sense, because IPR laws are focused on providing economic incentives for creativity.

For example, trademark law has sometimes fortified markets of authentic products derived from TK and TCE, and patent disclosure provisions are essential to the safeguarding of TK and GR, lest rights be erroneously granted to outsiders to the source communities.

¹⁵⁴ Larry Sait Muling, ‘Geographical Indications – What is New in the Asia – pacific Region? Malaysia Perspective’ (PowerPoint, Malaysian Pepper Board) (available at https://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bkk_13/wipo_geo_bkk_13.pdf) & Intellectual Property Corporation of Malaysia (MyIPO) survey Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021).

¹⁵⁵ Lao Reasey, Deputy Director at Department of Intellectual Property, Ministry of Commerce, Cambodia, Consultative Workshop on Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (GRTKTCE) Policy Considerations, 29-30 April 2020) Workshop Day 1.

¹⁵⁶ Lao Reasey, Deputy Director at Department of Intellectual Property, Ministry of Commerce, Cambodia, Consultative Workshop on Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (GRTKTCE) Policy Considerations, 29-30 April 2020) Workshop Day 1.

Nevertheless, many of the fundamental incompatibilities between IPR and cultural practice remain. For example, although TK may be afforded additional protections where it is exempt from material form requirements, copyright law has never successfully adapted to accommodate for communal rights and responsibilities to TCE.

This has naturally led many governments, lawyers, academics, and community stakeholders to consider rights-based approaches. This reflects a shift in thinking away from culture as a form of (intellectual) property. Instead, people's behaviours are regulated, and their rights protected.

UNDRIP was referred to in Section 3. While UNDRIP, as an international instrument, is not legally binding within countries, it nevertheless sets a benchmark for the rights of Indigenous peoples. UNDRIP is very influential in both legislative drafting and non-legal measures. Certainly, from an Australian perspective, UNDRIP is fundamental to advocacy for the rights of Aboriginal and Torres Strait Islander peoples.

International law has addressed cultural rights in a number of instruments. Over the last several decades, the United Nations Educational, Scientific and Cultural Organization (UNESCO) have produced many influential instruments, including the Universal Declaration on Cultural Diversity¹⁵⁷ and the Convention on Safeguarding Intangible Cultural Heritage¹⁵⁸.

In that time the UN has also produced the Convention on Biological Diversity¹⁵⁹ and the Nagoya Protocol on Access and Benefit Sharing¹⁶⁰.

The agri-food sector has also produced instruments aimed particularly at protection of TK and GR as it relates to food sustainability, most significant of which is the International Treaty on Plant Genetic Resources for Food and Agriculture, facilitated by the Food and Agriculture Organisation of the United Nations.¹⁶¹

It is fair to say that many countries have struggled to translate these international instruments and standards into domestic law. The greatest progress made, is probably in the area of *sui generis* laws (addressed in Section 4.3). In terms of amendments to existing laws, biodiversity and heritage laws have made progress in legislating for access and benefit sharing when accessing GR and TK. Other areas of law have been amended to varying degrees in order to improve protections for TK and TCE. This section will look at some key non-IPR protections for cultural heritage and their advantages and disadvantages.

¹⁵⁷ *Universal Declaration on Cultural Diversity*, CLT/2002/WS/11 (signed and entered into force 2 November 2001) (available at <https://unesdoc.unesco.org/ark:/48223/pf0000127162?posInSet=18&queryId=a0c9adf9-dfc0-4129-b324-7064f5cebc2b>).

¹⁵⁸ *Convention on Safeguarding Intangible Cultural Heritage*, UN Doc MISC/2003/CLT/CH/14 (signed and entered into force 17 October 2003) (available at <https://unesdoc.unesco.org/ark:/48223/pf0000132540>).

¹⁵⁹ *Convention on Biological Diversity*, signed 5 June 1992, [1993] ATS 32 (entered into force 29 December 1993).

¹⁶⁰ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the 1992 Convention on Biological Diversity*, opened for signature 29 October 2010, (not yet in force) ('Nagoya Protocol') (available at <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>).

¹⁶¹ *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, ETS L378 (entered into force 29 June 2004) (available at <http://www.fao.org/3/i0510e/i0510e.pdf>).

4.2.1. Can consumer laws protect TCE against fake products?

Many countries already have established consumer laws. *Australia has the Competition and Consumer Act 2010*.¹⁶² Schedule 2 of that Act, is *The Australian Consumer Law (ACL)*.¹⁶³ The ACL prohibits false and misleading representations and conduct. These laws can apply to false and misleading representations and conduct in relation to Aboriginal and Torres Strait Islander products but they are not specifically designed for protection of Indigenous Cultural and Intellectual Property (ICIP).

A common criticism of using the law for this purpose is that fake art producers can easily avoid breaking the law by producing products in an Aboriginal or Torres Strait Islander *style* without actually making representations that it was made by an Aboriginal or Torres Strait Islander person or business. Nevertheless, there have been cases in which ACL was successfully applied against producers of fake art.

Case Study: False and misleading representations

In 2019, Birubi Art was fined \$2.3m for false and misleading representations and conduct under the Australian Consumer Law. A non-Indigenous Australian company, Birubi Art, had arranged to have items made in Indonesia which were then sold in Australia as “Aboriginal Art” “hand painted” in Australia.¹⁶⁴ However, the postscript to this is that Birubi never actually paid the fine and instead went into liquidation. One of the directors of Birubi has now started another company which again has become involved in controversy, this time in relation to the use of the Aboriginal flag.¹⁶⁵

Case Study: Consumer law amendments in Australia

The Fake Art Harms Culture campaign in Australia estimates that around 80% of the products available in shops are inauthentic.¹⁶⁶ Fake Art is a significant problem in Australia. In response to this issue, there were two proposed amendments to the ACL: one by Independent Member of Parliament (MP), Hon Bob Katter, and the more recent one by Greens Senator Sarah Hanson-Young. The two bills were broadly similar in structure – both proposed a new ACL clause 50A prohibiting misuse of Indigenous cultural expression.¹⁶⁷ The latter bill seemed to address several

¹⁶² Australia has the *Competition and Consumer Act 2010* (Cth).

¹⁶³ *Competition and Consumer Act 2010* (Cth), sch 2.

¹⁶⁴ Australian Competition & Consumer Commission, *\$2.3M penalty for fake Indigenous Australian Art* (26 June 2019) <<https://www.accc.gov.au/media-release/23m-penalty-for-fake-indigenous-australian-art>>; Lorena Allam, *Birubi Art fined \$2.3m for selling fake Aboriginal art made in Indonesia* (26 June 2019) *The Guardian* <<https://www.theguardian.com/artanddesign/2019/jun/26/birubi-art-fined-23m-for-selling-fake-aboriginal-art-made-in-indonesia>>.

¹⁶⁵ Darren Coyne, *So, whose flag is it?: Non-Indigenous company says it is acting in the interests of the flag's designer* (19 June 2019) NITV <<https://www.sbs.com.au/nitv/article/2019/06/12/so-whose-flag-it-1>>.

¹⁶⁶ *Fake Art Harms Culture*, Arts Law Centre of Australia <<https://www.artslaw.com.au/fake-art-harms-culture/>>.

¹⁶⁷ Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) (available at

of the criticisms of the former. For example, one of the criticisms of the former bill was that the 'thing' had to be produced in Australia and so did not allow for when Aboriginal and Torres Strait Islander artists chose to internationally outsource the manufacture of a good under licence. The Hanson-Young bill stated that only Indigenous cultural artefacts¹⁶⁸ had to be manufactured in Australia by an Indigenous artist or Indigenous community. The Katter bill went before the House of Representatives but is not proceeding. The Hanson-Young bill is still marked as being "Before Senate" but it was referred to the Environment and Communications Legislation Committee for inquiry on 4 July 2019 and the Committee recommended that the Senate not pass the bill and instead consult further with Indigenous artists, organisations and communities.¹⁶⁹

Case Study: Indian Arts and Crafts Board

The US has the *Indian Arts and Crafts Act* of 1990 (P.L. 101-644).¹⁷⁰ It prohibits misrepresentation in marketing of Indian art and craft products within the US. Civil and criminal penalties apply and there is a dedicated online portal for reporting violations.¹⁷¹

In fact, these offences are similar to other legislative regimes that prohibit false and misleading representations. Perhaps the greatest differences are the use of criminal sanctions and the Indian Arts and Crafts Board (**IACB**). The IACB operates within the US Department of the Interior and includes several Native American commissioners. The role of the IACB is to implement and enforce the Act. The Native American representatives on the Board provide cultural advice and understanding of the impacts of appropriation. This assist the board in the role of enforcing truth in advertising legislation.

The inclusion of Native Americans on the Board includes a point of view of lived experiences and cultural impacts.

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1170 ('Hanson-Young Bill');

Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) (available at

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6585) ('Katter Bill').

¹⁶⁸ Indigenous cultural artefact was defined in the bill as meaning "a good which is of archaeological, anthropological, historical, scientific, social or spiritual significance to and Indigenous community" s2(1) of the Hanson-Young Bill.

¹⁶⁹ *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019*, Parliament of Australia

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/IndigCulturalExpression>; Parliament of Australia, *List of Recommendations*,

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/IndigCulturalExpression/Report/section?id=committees%2freportsen%2f024309%2f27547>.

¹⁷⁰ *Indian Arts and Crafts Act of 1990*, U.S. Department of the Interior <<https://www.doi.gov/iacb/indian-arts-and-crafts-act-1990>>.

¹⁷¹ U.S. Department of the Interior, *Should I report a Potential Violation* <<https://www.doi.gov/iacb/should-i-report-potential-violation>>; Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) (available at

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6585) ('Katter Bill').

So, can consumer laws protect TCE against fake art? Probably only to a limited extent. False and misleading prohibitions can, and have, been enthusiastically applied. However, the issue that fake art producers can avoid breaking the law by simply refraining from making a direct claim of authenticity, remains. It is possible that linking consumer laws to a GI regime may have greater success. The unsuccessful Australian ACL amendment also had potential to achieve further protections.

4.2.2. Do biodiversity laws ensure equitable access to GR through access and benefit sharing?

The Convention on Biological Diversity (CBD) and the Nagoya Protocol is the primary international standard for equitable sharing of benefits arising from the utilisation of GR.

Under the Nagoya Protocol each party is expected to take measures to ensure TK associated with GR is accessed with prior informed consent or approval and involvement of the Indigenous and Local Communities to which the GR belongs.¹⁷² Customary laws and protocols should be considered with respect to GR and its underlying TK.¹⁷³

The obligation to equitably share the benefits of utilisation and commercialization in article 5, is supplemented by the Annex in which there are a list of suggestions for monetary and non-monetary benefits.¹⁷⁴

Some of the monetary benefits would include:

- access fees/fee per sample collected or obtained through other means;
- up-front payments;
- milestone payments;
- payment of royalties;
- licence fees when commercialising work;
- salaries; and
- joint ownership of IP rights.¹⁷⁵

While some of the non-monetary benefits are:

- collaboration, cooperation and contribution in development programmes, education and training;
- strengthening capacities for technology transfer;
- institutional capacity building;
- contributions to the local economy;
- research directed towards priority needs;
- institutional and professional relationships;
- joint ownership of intellectual property rights; and
- social recognition.¹⁷⁶

¹⁷² Ibid art 7.

¹⁷³ Ibid art 12.

¹⁷⁴ Ibid, art 5 & annex.

¹⁷⁵ Ibid p 24.

¹⁷⁶ Ibid, p. 25.

In fact, in most circumstances a combination of monetary and non-monetary benefits would be appropriate. Recognition of source communities would be essential (referred to as “social recognition”) but should be just part of benefit sharing arrangements. It is unlikely that non-monetary benefits alone would constitute equitable benefit sharing, certainly not where there is commercialisation of the GR.

Case Study: Australia’s response to the Nagoya Protocol

The Nagoya Protocols have been incorporated into Australian law, to some extent, through the *Environmental Protection and Biodiversity Conservation Act & Regulations* (EPBC Act).¹⁷⁷ The objects of the EPBC Act include to:

- recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and
- promote the use of Indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.¹⁷⁸

Under the EPBC Regulations, an applicant for a permit for access to biological resources (e.g. collection of living material or sampling stored material) for commercial (or potentially commercial) purposes in a Commonwealth area must enter into a benefit sharing agreement with each access provider (e.g. the native title holders for the area) for the resources.¹⁷⁹

Additionally, if the biological resources are in an area that is Indigenous peoples’ land and the access provider is an owner or native title holder, the owner or native title holder must give informed consent to the benefit sharing agreement.¹⁸⁰ The Minister will consider several matters when assessing whether informed consent has been given, including:

- whether the access provider has been given enough time to consider the application and consult with relevant people;
- whether the access provider has been given enough time to negotiate the benefit sharing agreement; and
- whether the access provider has received independent legal advice.¹⁸¹

QLD and the NT have also addressed access and benefit sharing in their state and territory laws.

¹⁷⁷ Evana Wright, Ann Cahill, and Natalie Stoianoff, ‘Australia and Indigenous Traditional Knowledge’ (2017) (2017) *University of Technology Sydney Law Research Series* 6, 39.

¹⁷⁸ Department of Agriculture, Water and Environment, *About the EPBC Act*, <<https://www.environment.gov.au/epbc/about>>.

¹⁷⁹ *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) r 8A.06-8A.07.

¹⁸⁰ *Ibid* r 8A.10.

¹⁸¹ *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) r 8A.10.

The Queensland Parliament in 2020 passed the *Biodiscovery and Other Legislation Amendment Act 2020* to align the Act with the Nagoya Protocol.¹⁸² The amending provisions imposed an obligation on persons accessing TK when engaging in or preparing to engage in biodiscovery.¹⁸³ Here, reasonable and practical measures must be employed to ensure TK is not used for biodiscovery other than under an agreement with the custodians of the knowledge.¹⁸⁴ Compliance with this provision can be achieved by abiding by the TK code of practice,¹⁸⁵ where such a code is created by the relevant Minister.¹⁸⁶ In Queensland, a code of practice is currently being developed by the Queensland government in consultation with First Nations peoples and biodiscovery entities.¹⁸⁷ Further protection to TK are provided by legislation which requires the relevant Minister to be satisfied that TK will be protected before entering into benefit-sharing agreements.¹⁸⁸

In the Northern Territory, it is the *Biological Resources Act 2006* (NT) that governs access to resources. Under the Act, Bioprospectors are obliged to enter into benefit-sharing agreements with each resource access provider.¹⁸⁹ The benefit-sharing agreement must include protection for, recognition of and valuing of any Indigenous people's knowledge to be used.¹⁹⁰ The prior informed consent of the resource access providers is also a necessary condition for the benefit-sharing agreement to be valid.¹⁹¹ In determining whether prior informed consent has transpired, various factors will be considered. However, where biological resources are in an area that is Aboriginal land, the resource access provider for the resources is a Land Trust. In these cases, the relevant Land Trust should be given adequate time to consult with the traditional owners for the land.¹⁹²

Case Study: Lao PDR's *Biotechnology Safety Law*

In Lao PDR, the *Biotechnology Safety Law (2014)* sets out the principles, regulations and measures on management and monitoring of biotechnology safety.¹⁹³ The law applies to those people and entities working in the field of biotechnology in Lao PDR.¹⁹⁴ The Act refers specifically

¹⁸² Department of Environment and Science, *Reform of the Biodiscovery Act 2004* (28 May 2021) <<https://environment.des.qld.gov.au/licences-permits/plants-animals/biodiscovery/biodiscovery-act-reform>>; *Plants and animals* (27 September 2016) Queensland Government Department of Environment and Science <<https://environment.des.qld.gov.au/licences-permits/plants-animals/biodiscovery/biodiscovery-act-reform>>.

¹⁸³ *Biodiscovery Act 2004* (Qld) s 9B(1).

¹⁸⁴ *Ibid* s 9B(2).

¹⁸⁵ *Ibid* s 9B(4)(a).

¹⁸⁶ *Ibid* s 9C.

¹⁸⁷ Queensland Government, *Traditional knowledge and biodiscovery Business Queensland* (30 September 2020) <<https://www.business.qld.gov.au/industries/science-it-creative/science/biodiscovery/traditional-knowledge#:~:text=A%20Traditional%20knowledge%20code%20of,and%20comply%20with%20their%20obligations.&text=the%20circumstances%20in%20which%20the,for%20use%20of%20traditional%20knowledge>>.

¹⁸⁸ *Biodiscovery Act 2004* (Qld) s 33(2).

¹⁸⁹ *Biological Resources Act 2006* (NT) s 27(1).

¹⁹⁰ *Ibid* s 29(1).

¹⁹¹ *Ibid* s 27(3).

¹⁹² *Ibid* s 28(2)(b)(ii).

¹⁹³ *Biotechnology Safety Law (2014)* (Malaysia) Objectives.

¹⁹⁴ *Biotechnology Safety Law (2014)* (Malaysia) art 6.

to TK requiring consent for its use and sharing of benefits.¹⁹⁵ It is also expected that GR and TK is used sustainably.¹⁹⁶

Case Study: Malaysia's Access and Benefit Sharing Act

Malaysia has the *Access to Biological Resources and Benefit Sharing Act 2017*, which became effective in December 2020.¹⁹⁷ According to the Act, a person has access to a biological resource if:

- *taking of a biological resource from its natural habitat or place where it is kept, grown or found, including in the market for the purpose of research and development; or*
- *there is a reasonable prospect as determined by the Competent Authority that a biological resource taken by the person will be subject to research and development.*¹⁹⁸

If a person does intend to access a biological resource (or TK associated with the biological resource) for commercial, or potentially commercial, purposes they must apply for a permit from the competent authority.¹⁹⁹ There are conditions that must be met before the competent authority can grant the permit. These conditions include that a benefit sharing agreement is established, and confirmation that the applicant has obtained prior informed consent.²⁰⁰ Even if the person is not intending to use the resource of TK for commercial purposes, they must still demonstrate informed consent before the competent authority can issue them a permit.²⁰¹

If there is no representative, organization or body that can be identified, through customary law and protocols with which to enter the benefit sharing agreement, and the traditional knowledge holders cannot be identified, then any benefit sharing agreement will be entered into with the Federal Government of State Authority, and any monetary benefit shared will be deposited into a fund established by the Federal or State Government, and that money will be applied for the benefit of Indigenous and Local Communities, according to advice of the advisory board, also established under the Act.²⁰²

Another significant element of the legislation is that it establishes a clearing house mechanism as a means for sharing information relating to access and benefit sharing and information.²⁰³

¹⁹⁵ *Biotechnology Safety Law (2014)* (Malaysia) s 4, art 22(2).

¹⁹⁶ *Biotechnology Safety Law (2014)* (Malaysia) s 4, art 22(3).

¹⁹⁷ Intellectual Property Corporation of Malaysia (MyIPO) survey Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRKTCE Survey) 29-30 April 2021).

¹⁹⁸ *Access to Biological Resources and Benefit Sharing Act 2017*(Malaysia) s 5.

¹⁹⁹ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s 12(1).

²⁰⁰ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s 12(a) & (b).

²⁰¹ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s 15(3)(b).

²⁰² *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s 23(4) & (5).

²⁰³ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s 32.

Case Study: Protection framework in the Philippines

The Philippines has a series of Administrative Orders issued through the National Commission on Indigenous Peoples (NCIP), a government agency, that regulates researcher access to TK and GR, and promotes free, prior, informed consent and benefit sharing.²⁰⁴ The Administrative Orders include:

Administrative Order No 03012, *The Revised Guidelines on Free and Prior Informed Consent and Related Processes of 2012.* Under the Guidelines, no concession, license, permit or lease, production-sharing agreement, or other undertaking affecting ancestral domains shall be granted or renewed without following the Guidelines.²⁰⁵ Any bio-prospecting or related activity is considered extractive/intrusive/large scale.²⁰⁶ Applicants must therefore follow the Free and Prior Informed Consent (FPIC) process set out in the Guidelines, which include consideration of the proposal by community assemblies.²⁰⁷ The Guidelines also establish FPIC Teams according to provinces.²⁰⁸

Administrative Order No.01-12, *The Indigenous Knowledge Systems and Practices and Customary Laws Research and Documentation Guidelines of 2012.* These Guidelines apply to research and documentation of Indigenous Knowledge Systems and Practices (IKSPs).²⁰⁹ This includes community-initiated research, academic research and research in the aid of policy.²¹⁰ When research of this kind is conducted, the community is entitled to receive royalties and other benefits including:

- copies of the final and approved version of the research, a royalty fee derived from the use of the research output,
- a user fee when there is commercial use of IKSP that falls outside of copyright, and
- other monetary or non-benefits agreed between the parties.²¹¹

Administrative Order No.01, *Rules and Regulations on IP Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of the Indigenous Peoples and Indigenous Cultural Communities.* Where an IP right requires application for registration, the applicant must disclose IKSP that is used in the subject matter of the application and include a

²⁰⁴ Teodoro Pascua, Deputy Director General at Intellectual Property Office of the Philippines and Kristinne Dianne Vilorio, Senior Technical Consultant at Intellectual Property Office of the Philippines, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) & Department of Intellectual Property (Lao PDR Survey, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Philippines Survey).

²⁰⁵ National Commission on Indigenous Peoples, *The Revised Guidelines on Free and Prior Informed Consent and Related Processes*, Administrative Order No. 3, 23 April 2012 (Philippines) s 3(c) (available at <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ph/ph189en.pdf>).

²⁰⁶ Ibid s 19.

²⁰⁷ Ibid s 22.

²⁰⁸ Ibid s 16.

²⁰⁹ NCIP, 'The Indigenous Knowledge Systems and Practices and Customary Laws Research and Documentation Guidelines of 2012' (Administrative Order No 1, NCIP, 2012) s 4 (available at <https://www.wipo.int/edocs/lexdocs/laws/en/ph/ph190en.pdf>).

²¹⁰ Ibid s 7.

²¹¹ Ibid s 9.

statement of free, prior, informed consent from the Indigenous cultural communities concerned.²¹² In fact, failure to comply with these rules and regulations can result in cancellation of the registration.²¹³

That said, during the Consultative Workshop a case study was suggested in which saliva samples were taken from members of an Indigenous community, without proper free, prior, informed consent. A trend was reported that some researchers fail to co-ordinate access to ancestral domains with the NCIP and fail to follow proper cultural protocols.²¹⁴

To conclude, biodiversity laws can potentially go a long way to protecting TK and GR. Legislating for benefit sharing agreements is an effective way to promote ethical commercialisation projects, particularly in relation to TK and GR. Certainly, leaving access and benefit sharing arrangement entirely to the ethics of the parties (without legal, regulatory or policy levers) leaves Indigenous and Local Communities vulnerable to biopiracy.

When considering access and benefit sharing legislation, much will depend on when obligations are triggered, minimum acceptable standards for the content of the agreement and probably guidance around standards of free, prior informed consent.

4.2.3. Are breach of confidence laws able to protect TK?

Breach of confidence laws have been used to protect TK in Australia. For example, the *Foster v Mountford* case in the 1970s.²¹⁵ Mountford was an anthropologist who took a field trip to the remote Northern Territory in Australia in the 1940s. He recorded sacred men's information of the Pitjantjatjara people in a book he wrote. The senior male elders of the Pitjantjatjara people were concerned that the publication of their knowledge in a book would be culturally damaging to their traditional society. They argued that they had given the information to Mountford in confidence, and to publish it would be a breach of confidence, and also cause detriment to them.²¹⁶

That said, the law of confidentiality is very unlikely to provide much protection for TK. In Australia there is no specific legislation for the law of confidentiality. The closest Australia comes to legislatively protecting confidentiality is through state and Federal privacy laws. The *Foster v Mountford* case relied on the equitable doctrine associated with confidential information. It is fortunate that in the *Foster v Mountford* case the equitable principles could be applied in the circumstances to protect the TK of the Pitjantjatjara people, but in general the law of confidentiality would do a poor job of comprehensively protecting TK. It is likely that there would be many circumstances in which non-Indigenous people would access TK in circumstances that did not

²¹² IPOPHl & NCIP, *Rules and Regulations on IP Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of the Indigenous Peoples and Indigenous Cultural Communities*, Administrative Order No. 01 (2016) r 6(a) (available at <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ph/ph202en.html>).

²¹³ *Ibid* r 6(d).

²¹⁴ Consultative Workshop, Rizzabel, a. Madangeng, Attorney at National Commission, the Philippines, day 1.

²¹⁵ *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71.

²¹⁶ Christoph Anton, 'Foster v Mountford: cultural confidentiality in a changing Australia' (2009) *Cambridge University Press* 110.

establish a fiduciary relationship between the parties. And then, of course, the additional concern is that the enforcement of the law of confidentiality puts the onus on the Indigenous or Local Community to try and prevent the breach (through injunction). Legal action is expensive, and, in reality, once a breach occurs, the cultural damage is already done.

4.2.1. Does Native Title protect GR, TK or TCE?

Native Title laws can play a limited role in protecting GR, TK or TCE through a determination of rights and interests in land. In Australia, Native Title sits within property law, and identifies the 'bundle of rights in land' that determinants may have²¹⁷. However, this protection is limited. The relationship between Native Title and Intellectual Property Rights has not been extended within the Australian context to provide robust protection. The case of *Western Australia v Ward* (2002) 213 CLR 1 held that the *Native Title Act* cannot protect 'a right to maintain, protect and prevent the misuse of cultural knowledge', if it goes beyond denial or control of access to land or waters'. This is evident in the opening words of s 223(1) 'the expression *native title* or *native title rights and interests*, means the communal group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters'.²¹⁸ The High Court, has stated in a joint judgement that:²¹⁹

To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land ...

However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere.

Furthermore, in the earlier case of *Bulun Bulun v R & T Textiles Pty Ltd*, a claim of Native Title rights and interests in relation to TCE has been claimed, although not pressed.²²⁰ In this case, von Doussa J in passing commented that the Applicant appeared 'to assert that intellectual property rights of the kind claimed...were an incident of native title in the land', 'such that they constituted some recognisable interest in the land itself'.²²¹

TCE such as rock art on native title lands, or GR held on native title lands may be protected through rights pertaining to exclusivity of possession and limitation of public or commercial interests to access lands. However, to extend the link from native title to intellectual property rights, such as those in the design and styles of TCE is not applicable. Arguably, this is because native title is rooted in colonial property law. Therefore, Native Title provides a limited protection of GR and TCE, as it applies to objects that are found within Native Title lands. This demonstrates

²¹⁷ PBC, *Native title, rights and interests*, <<https://nativetitle.org.au/learn/native-title-and-pbcs/native-title-rights-and-interests>>.

²¹⁸ *Native Title Act 1993* (Cth) s 223(1).

²¹⁹ *Western Australia v Ward* [2002] 213 CLR 1, [559] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), (Kirby J, viewing the key issue as pertaining to the opening words of s 223(1)(b)).

²²⁰ *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244, 244-256.

²²¹ *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244, 244-256.

the limitation of using colonial laws to protect GR, TK and TCE, as it is using a colonial system to fix the issues created by a colonial system.

4.3. Sui generis

There has been a lot of attention focused on the potential of *sui generis* laws to protect GR, TK, and TCE. This attention is probably based on the perception that new legislation avoids all the difficulties of amending existing legislation. Existing legislation may have a number of norms and assumptions that are difficult to reconcile with customary law and protocols. In comparison, a new law can be specifically drafted to respond to the needs of Indigenous and Local Communities.

This is only partly true. *Sui generis* laws do have the potential to address policy concerns more holistically. However, there are two important considerations:

- **Sui generis laws are unlikely to be a complete answer to GR, TK and TCE protections:** Any new law will still need to work with existing laws. Additionally, if the terms of the new law are inconsistent with rights granted under existing IP laws, there is likely to be confusion.
- **New laws can be difficult to pass:** Passing a new law through any legal system can take a lot of time and work. It can be a complicated process and there is no certainty that a draft law will pass into enforceable law. The new law may also require amendments from time to time which adds another layer of complexity and time.

Additionally, there remains the question as to scope of any *sui generis* law. Will the law be expected to protect all GR, TK and TCE? As was clear in Section 2, there is great diversity in GR, TK and TCE and they can be misappropriated in many different ways. A holistic approach to all of GR, TK and TCE may not be desirable even if it was possible.

For these reasons, it is not recommended that all efforts towards GR, TK and TCE protection focus on *sui generis* alone. Instead, *sui generis* law should be considered as a desirable supplement to other legal and non-legal measures of protection.

Nevertheless, *sui generis* laws are an important consideration in understanding best practice GR, TK and TCE protection. This section looks more closely at what *sui generis* laws are and what they aim to achieve.

4.3.1. What is sui generis?

A common misconception of *sui generis* laws is that they are separate, standalone laws.²²² *Sui generis* laws can be standalone legislation, but they can also refer to amendments to existing laws, where those amendments are a specific response to a specific issue. For example, an amendment to copyright law that recognises communal rights over TCEs could be considered a *sui generis* amendment. It still exists within the IP law framework, but it is an amendment designed specifically to address policy concerns for the misappropriation of TCEs.

²²² Secretariat, 'Elements of a *Sui Generis* System for the Protection of Traditional Knowledge' (Report No. WIPO/GRTKF/IC/3/8, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3rd session, Geneva 13 June 2002) p 9 (available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8).

As the World Intellectual Property Organisation's Intergovernmental Committee (**WIPO IGC**) puts it:

*What makes an intellectual property system sui generis is the **modification of some of its features** so as to properly accommodate the **special characteristics its subject matter**, and the specific policy needs which led to the **establishment of a distinct system**.²²³*

Sui generis laws – standalone laws or as amendments to existing laws – generally seek to achieve the policy objectives set out in Section 3. *Sui generis* law and amendments are formulated because existing laws do not address the policy objectives. In fact, this means that for many AANZFTA Parties, they already have some *sui generis* laws.

Common features of *sui generis* laws created to improve protections for GR, TK, and TCE include:

- allowance for cultural works that are not in material form;
- perpetual rights, avoiding the issue of cultural property passing into the public domain after the expiry of rights (the difficult balance between the policy objectives of the public domain, and protection of GR, TK and TCE are discussed later in this section);
- appropriate exceptions and limitations that allow for customary and other fair uses of GR, TK and TCE;
- prohibition on non-traditional uses of sacred/secret material;
- appropriate penalties for unauthorised use of misappropriation; and
- consent protocols for authorised use of GR, TK and TCE. Ideally these consent protocols should leverage existing customary law.²²⁴

The challenges of IPR laws were discussed in Section 4.1 and policy levers were considered in Section 3. The common features listed above were evidently designed to satisfy policy objectives that are not otherwise satisfied by IPR laws.

A list compiled by WIPO of *sui generis* laws in January 2021 listed 27 countries including Vietnam, Philippines and New Zealand.²²⁵

²²³ Secretariat, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (Report No. WIPO/GRTKF/IC/37/7, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 37th session, Geneva, 27 August 2018) 8-9 (available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365); Secretariat, 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (Report No. WIPO/GRTKF/IC/37/6, Intergovernmental Committee on Intellectual Property and Genetic Resources 37th session, Traditional Knowledge and Folklore, Geneva, 27 August 2018) (available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=411448).

²²⁴ Secretariat, 'Elements of a *Sui Generis* System for the Protection of Traditional Knowledge' (Report No. WIPO/GRTKF/IC/3/8, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3rd session, Geneva 13 June 2002) (available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8).

²²⁵ WIPO, *Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions* (18 January 2021) <https://www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf>.

4.3.2. What are the aims of sui generis?

As outlined above, *sui generis* laws generally seek to achieve the policy objectives that are not otherwise achieved through existing law. More broadly, there are three underlying aims of *sui generis* laws:

- **Positive Protection:** a grant of positive rights to Indigenous and Local Communities. In some cases, this occurs within an existing IPR frameworks, particularly in relation to protection of TCE.
- **Defensive Protection:** establishment of systems to prevent misappropriation of GR, TK or TCE. Databases are frequently used as a defensive protection. For example, TK is *defensively* protected when it is entered onto a database and thereby is recognised as part of the prior art base when a patent application is assessed.
- **Incorporation of customary laws:** some *sui generis* laws seek to leverage existing customary laws and authorities to protect GR, TK and TCE. This aim is consistent with the principle of self-determination and has significant practical advantages in terms of respecting existing locally recognised mechanisms.²²⁶

4.3.3. Do sui generis IPR laws undermine the policy objective of the public domain?

In general, the public domain is the term used to describe expressions of knowledge that deliberately remain open and free to access by all members of the public. The public domain has been described as:

*A reservoir of resources accessible to the public for creative or consumptive uses.*²²⁷

Knowledge may be in the public domain, either because it was once subject to IP protections which have now expired, or because they are in a form that did not allow them to be recognised by IP protections in the first place (for example, oral histories often remain in the public domain until fixed in a material form).

Historically, much TK has been considered part of the public domain. This raises the question: if we apply property rights to TK, will the policy objectives of the public domain be undermined?

In answer to this question, some commentators have raised the concern that recognition of IP rights in TK may have a chilling effect on scientific innovation and creativity.²²⁸ Professor Ruth L. Okediji is the chair of the International Law Research Program's expert working group on international intellectual property, traditional knowledge and genetic resources at the Centre for International Governance Innovation. Professor Okediji has argued that recognition of TK through

²²⁶ Secretariat, 'Elements of a *Sui Generis* System for the Protection of Traditional Knowledge' (Report No. WIPO/GRTKF/IC/3/8, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3rd session, Geneva 13 June 2002) (available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8).

²²⁷ Ruth Okediji, 'Traditional Knowledge and the Public Domain' (CIGI paper No 176, Centre for International Governance Innovation, June 2018) p 4 (available at <https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf>).

²²⁸ *Ibid.*

the IP system does not necessarily critically undermine the public domain.²²⁹ She argues that the threat to the public domain is often overstated. In fact, the public domain is not monolith or static.²³⁰ Instead it is vast, ill-defined, and already varies greatly between and within countries (e.g. the public domain for copyright, can vary from the public domain for trade marks).

While Professor Okediji is affirming the advantages of using or adapting existing IP frameworks, she provides rebuttal of the criticism that removing resources from the public domain may prevent innovation: the utilitarian motivations behind IP law are to *encourage* innovation and creativity by granting rights to the innovators and creators. This still applies to knowledge held by Indigenous and Local Communities.

Professor Okediji suggests a tiered approach to TK protections, adapted from the tiered approach developed in WIPO IGC discussions.²³¹ That is, she suggests four separate categories of TK:

- **Secret and sacred knowledge** – the highest level of protection. Injunctions against unauthorised use may be an available remedy.
- **Closely held TK** – this could have similar economic and moral rights to secret and sacred knowledge, given its continuing close links to cultural heritage
- **Widely disseminated TK** – this could be knowledge that is no longer closely held by communities and instead is widely disseminated. This kind of knowledge could have rights of attribution. Some GI rights might be appropriate for TK that falls within this category.
- **Generic TK** – Like the previous category this knowledge has been widely disseminated, but unlike the previous category, it no longer has any close links to any specific Indigenous or Local Community. Put another way: there is no “nexus to a discrete Indigenous group”.²³² This knowledge could fall in the public domain.²³³

Evidently further consideration must be given to negotiation of the boundaries between the public domain, and private rights (including private rights over TK). Nevertheless, the tiered approach suggested by Professor Okediji is well worth further consideration as it provides a possible framework for negotiating that boundary in a way that balances communal and individual rights.

This discussion was relevant for parties considering amending existing IPR laws to extend protection for TK as legislators will no doubt, be motivated to balance both the policy objectives of GR, TK and TCE protection and competing policy objectives in operation behind IPR laws.

4.3.4. How can sui generis law recognize customary law?

Incorporation of customary law into legal and non-legal mechanisms for the protection of culture has several advantages. For example, communities have the greatest authority when it comes to

²²⁹ Ibid 1.

²³⁰ Ibid 8.

²³¹ Ibid 14.

²³² Ibid 15.

²³³ Ibid 14-15.

identifying or defining their TK.²³⁴ Source communities of TK are also likely to have internal protocols for dispute resolution.²³⁵

In general, methods of application of customary law include:

- direct incorporation of customary law, into the country's legal system;
- application of elements of customary law, as substantive law;
- application of elements of customary law, as procedural law;
- having reference to elements of customary law to determine facts (that will then impact how the law is applied);
- promotion of customary law and practices.²³⁶

²³⁴ *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of The Issues*, WIPO, p 4 <https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf>.

²³⁵ *Ibid.*

²³⁶ *Ibid* 20-21.

Promotion of customary law and practices

Case Study: Recognitions of customary law in the Philippines

In the Philippines, there are 110 recognised ethnolinguistic Indigenous cultural communities, each with their own customary laws, beliefs and practices.²³⁷ Under section 22 of article 2 of the Constitution, the state commits to recognising and promoting the rights of Indigenous cultural communities within the framework of national unity and development.²³⁸ Furthermore, under section 5 of article 12: “The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.”²³⁹

This undertaking is followed through in the *Indigenous Peoples’ Rights Act 1997 (IPRA)*. Several clauses recognise the customary laws of Indigenous Cultural Communities and Indigenous Peoples including recognising the right of self-governance and self-determination²⁴⁰ and the right to use their own customary laws as may be compatible with the national legal system and internationally recognised human rights.²⁴¹ The IPRA offers wide protection including traditional resources rights and manifestations of culture and heritage as collective intellectual rights. It protects the cultural and intellectual rights of Indigenous Cultural Communities and Indigenous Peoples. This the ‘right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts.’²⁴²

Case Study: Brunei’s Application of Laws Act

In Brunei, the *Application of Laws Act* states that the English common law and doctrines of equity as well as statutes of general application in force on that date of the Act (25 April 1951) shall be in force in Brunei Darussalam, subject to local circumstances and customs.²⁴³

²³⁷ Intellectual Property Office of the Philippines, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Philippines Survey).

²³⁸ *The Constitution of the Republic of the Philippines*, art 2, s 22.

²³⁹ *The Constitution of the Republic of the Philippines*, art 12, s 5.

²⁴⁰ *Indigenous Peoples’ Rights Act 1997* (Philippines), art 2, s 13.

²⁴¹ *Indigenous Peoples’ Rights Act 1997* (Philippines) s 15.

²⁴² Section 34 IPRA; Christoph Antons ‘Asia Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expression’ (2013) 47(4) *Cambridge University Press* 1403 – 1433, 1417; Asia/Pacific Cultural Centre for UNESCO (ACCU), ‘2004 Workshop on Inventory-Making for Intangible Cultural Heritage Management: Final Report’ (2005) 1403 – 1433, 1417.

²⁴³ *Application of Laws Act 1951* (Brunei); Counsel from Brunei Intellectual Property Office (BruiPO), Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Brunei Survey).

Consultation with Indigenous and Local Communities on matters of procedural and substantive law

The current work of IP Australia is a good example of ways to incorporate, or reference, customary law, within an existing legal context.

Case Study: IP Australia's Indigenous Knowledge Plan

IP Australia is currently implementing their *Protection of Indigenous Knowledge in the Intellectual Property System Work Plan 2020-2021*.²⁴⁴ The Project seeks to improve IP Australia's engagement with Aboriginal and Torres Strait Islander peoples and their TK and TCEs. They focus on both cultural integrity and economic potential.²⁴⁵

To that end, IP Australia released the Indigenous Knowledge Consultation paper in February 2021. The paper focuses on four topic areas that reference trade marks, designs and patents:

- establishing an Indigenous Advisory Panel
- implementing measures for trade marks or designs that use Indigenous Knowledge
- applying new requirements to the disclosure of the source of Indigenous Knowledge in innovations
- possible labelling schemes for Aboriginal and Torres Strait Islander products, to promote the sale of authentic products and dissuade consumers from inauthentic products.²⁴⁶

The final topic area – consultations on labelling for authentic Indigenous products is part of the Australian Government's response to the *House of Representatives Standing Committee on Indigenous Affairs' Report on the impact of inauthentic art and craft in the style of First Nations peoples*.²⁴⁷ The consultations closed on May 2021, but IP Australia will publish the results at a later date.

IP Australia understands that it is not appropriate for the government department to make decisions about culture and consent.²⁴⁸ For this reason they are exploring options around ways to consult with community when it comes to whether it is appropriate to register a trade mark or design.

²⁴⁴ IP Australia (Cth), *Protection of Indigenous Knowledge in the Intellectual Property System*, Work Plan 2020-2021 (2020) (available at <https://www.ipaustralia.gov.au/sites/default/files/ip-australia-indigenous-knowledge-work-plan-2020-2021.pdf>).

²⁴⁵ IP Australia (Cth), *Protection of Indigenous Knowledge in the Intellectual Property System*, Work Plan 2020-2021 (2020) p 3 (available at <https://www.ipaustralia.gov.au/sites/default/files/ip-australia-indigenous-knowledge-work-plan-2020-2021.pdf>).

²⁴⁶ IP Australia (Cth), *Indigenous Knowledge*, Consultation Paper (2021) (available at https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf).

²⁴⁷ House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (2020) (available at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Government_Response).

²⁴⁸ IP Australia (Cth), *Indigenous Knowledge*, Consultation Paper (2021) p 7 (available at https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf).

Currently, IP Australia is already empowered to refuse registration of a trade mark under certain circumstances, including if it is scandalous or its use is contrary to law.²⁴⁹ They already recognise that a trade mark application should be rejected under certain circumstances. For example, if a trade mark includes the name of an Aboriginal or Torres Strait Islander group or nation, but it does not have any connection to that group or nation. But there are still gaps in their knowledge, so IP Australia are looking for ways of asking for further evidence about the use of Indigenous Knowledge in trade marks. They are looking for ways to leverage existing cultural authorities so that it is the source communities that ultimately say whether registration is culturally appropriate. Options considered include:

- asking for evidence of consent;
- assessing if cultural offense to a community or communities is caused; and
- assessing whether the use of the Indigenous Knowledge could be deceptive (by falsely suggesting a connection between the applicant's business and the Aboriginal or Torres Strait Islander source community).²⁵⁰

In fact, an Indigenous Advisory Panel could have a role in each of these measures.

Case Study: Māori Advisory Committees in New Zealand

New Zealand is a little ahead of Australia in this process and have already established Māori Advisory Committees for trade marks and patents. New Zealand currently plans to extend their existing plant variety rights regime to enable them to refer applications to a Māori Advisory Committee specifically for that regime. The intention is that the Committee will have power to make decisions about whether granting of plant variety rights to applicants will impact the cultural relationship between the traditional custodians and the plant species.²⁵¹

Case Study: The Waitangi Tribunal & the Plant Variety Rights Act

The *Treaty of Waitangi Act 1975* (NZ) established the Waitangi Tribunal.²⁵² Its functions include:

- Inquiring into and making recommendations on claims brought by Māori relating to legislation, policies and actions of the Crown that allegedly breach the promises made in the Treaty of Waitangi.
- Reporting on proposed legislation that has been referred to the Tribunal by the House of Representatives, or a Minister of the Crown

²⁴⁹ *Trade Marks Act 1995* (Cth) s 42.

²⁵⁰ IP Australia (Cth), *Indigenous Knowledge*, Consultation Paper (2021) p 8 (available at https://www.ipaustralia.gov.au/sites/default/files/ik_consultation_2021.pdf).

²⁵¹ Ministry of Business, Innovation and Employment Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (NZ Survey).

²⁵² *Treaty of Waitangi Act 1975* (New Zealand) s 4(1).

- Making recommendations about use of certain Crown forest land, railways land, state-owned enterprise land and land transferred to educational institutions.²⁵³

The Crown's review of the *Plant Variety Rights Act 1987* was referred to earlier. This review was prompted by New Zealand negotiating the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPPA**) (formerly the Trans-Pacific Partnership Agreement (**TPPA**)).²⁵⁴ It is a requirement of the CPTPPA that New Zealand comply with a convention produced by the Union for the Protection of New Varieties of Plants, known as UPOV 91. UPOV 91 strengthened plant breeders' rights confirming the exclusive rights of the rights holder.

New Zealand's review of the *Plant Variety Rights Act 1987* prompted an inquiry by the Waitangi Tribunal in 2015. Complainants argued that engagement with Māori during the review was inadequate and not compliant with the Treaty of Waitangi. In particular, the complainants argued that entry into the CPTPPA would diminish the Crown's ability to comply with the Treaty of Waitangi.

The Report was published in 2020. Ultimately, the Tribunal concluded that "We adjourned issues about the plant variety rights regime and UPOV 91 because the Crown had informed the Tribunal that it intended to undertake targeted engagement on issues relating to changes to the plant variety rights regime. We agreed to 'allow time for the [Crown's] process to be finalised and communicated to claimants and others".²⁵⁵

4.3.5. The role of national heritage and culture laws

Several countries have some form of legal regime for the protection of heritage and culture. In general, these laws focus on the rights of Indigenous and Local Communities to practice their culture. Some also regulate how members from outside the community may engage with Indigenous and Local Communities and their cultural property.

Nevertheless, the nature, scope and application of these laws varies widely. To illustrate: some laws focus on the cultural heritage of the nation, and some focus on the cultural heritage of a particular group within the nation. Some laws focus on a particular culture as a whole, while some focus on a particular expression of culture.

This section examines several case studies that illustrate different ways heritage and culture can be legislated for. In examining the key aspects of a country's heritage and culture laws we will focus on the provisions that could potentially impact the management and use of GR, TK and TCE.

²⁵³ New Zealand Government, *About the Waitangi Tribunal* (8 June 2021) <<https://waitangitribunal.govt.nz/about-waitangi-tribunal/>>; *Treaty of Waitangi Act 1975* (New Zealand) s 5(1).

²⁵⁴ Waitangi Tribunal, 'The Report on the Crown's review of the Plant Variety Rights Regime' (Report No WAI 2522, Waitangi Tribunal, 2020) p 1-2 (available at https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_167062478/Plant%20Variety%20Rights%20Regime%20W.pdfv).

²⁵⁵ *Ibid.*

Case Study: Lao PDR's Law on National Heritage (Amended) No 44/NA, dated 24 December 2013

Lao PDR's Law on National Heritage recognises intangible cultural heritage and defines it as "*intangible heritage which are of high outstanding values form a cultural point of view, such as local innovation, knowledge...languages...novels...traditional music...traditional dances...formulas of traditional medicine and other which are inherited from generation to generation*".²⁵⁶

Management of cultural heritage is through registration.²⁵⁷ In fact, it is recommended that cultural heritage that is of national significance have its copyright registered in the ownership of the nation.²⁵⁸

Once registered, the use of national cultural heritage must be consistent with the following purposes:

- As the basis for national prosperity
- To educate citizens to love their nation
- To increase the wealth of the store of national cultural and historical heritage
- To promote tourism
- To integrate with the use of regional and international cultural and historical heritage
- To conduct research on archaeological science, history and others.²⁵⁹

Then, article 25 states that

*The Government administers and protects the property and copyright subsisting in items of Lao PDR cultural and historical national heritage that belongs to individuals, legal entities or organisations which are inside or outside the territory of the Lao PDR, which are in the illegitimate possession of other countries, or in respect of which foreign countries have illegitimately asserted copyright.*²⁶⁰

The meaning of this seems to be, that when cultural heritage, in which copyright subsists, is infringed, the Government has standing to take action.

Case Study: Haka Ka Mate Attribution Act 2014

Ka Mate was composed by the Ngati Toa Rangatira chief, Te Rauparaha, a descendant of Hoturoa who was captain of the Tainui canoe.²⁶¹ Ka Mate are the words and associated actions and choreography, of the haka known as Ka Mate.²⁶² In 2014, New Zealand passed the *Haka Ka Mate Attribution Act*. Under the act, certain uses of Ka Mate, including publication for commercial

²⁵⁶ *Law on National Heritage (Amended) No. 44NA dated 24 December 2013* (Lao) art 11.

²⁵⁷ *Law on National Heritage (Amended) No. 44NA dated 24 December 2013* (Lao) art 25.

²⁵⁸ *Law on National Heritage (Amended) No. 44NA dated 24 December 2013* (Lao) art 26.

²⁵⁹ *Law on National Heritage (Amended) No. 44NA dated 24 December 2013* (Lao) art 42.

²⁶⁰ *Law on National Heritage (Amended) No. 44NA dated 24 December 2013* (Lao) art 25.

²⁶¹ *Haka Ka Mate Attribution Act 2014* (New Zealand) sch 1, s 1.

²⁶² *Haka Ka Mate Attribution Act 2014* (New Zealand) s 7.

purposes, must include a statement that Te Rauparah was the composer of Ka Mate and a chief of Ngati Toa Rangatira.²⁶³

This is an examples of a *sui generis* act that focuses on a specific aspect of culture, in this case the Ka Mate.

Case Study: New Zealand's Protected Objects Legislation

In New Zealand the Manatū Taonga Ministry for Culture & Heritage administers the *Protected Objects Act 1975* (NZ). The Act defines nine categories of protected New Zealand objects including archaeological objects, art objects, social history objects and Nga taonga tūturu (objects that relate to Māori culture and are more than 50 years old). The Act regulates the export of these objects, the illegal export or import of these objects and foreign objects, and the sale, trade or ownership of taonga tūturu.²⁶⁴

The UNIDROIT Convention on Stollen or Illegally Exported Cultural Objects and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Expert and Transfer of Ownership of Cultural Property 1970 entered into force in New Zealand in 2007. These conventions increase international protection of New Zealand's heritage objects.²⁶⁵

Case Study: Cultural Rights embedded in the Philippine Constitution

The Philippine Constitution requires that the state:

*Shall recognise, respect protect the rights of Indigenous Cultural Communities to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national plans and policies.*²⁶⁶

The Philippines also has the *Indigenous Peoples Rights Act of 1997*.²⁶⁷ The Act makes specific reference to community IPR. Section 32 confirms that the State will preserve, protect and develop Indigenous Cultural Communities' cultural manifestations and their right to restitution if their cultural, intellectual, religious or spiritual property is used without their free and prior informed consent, or in violation of their laws, traditions and customs.²⁶⁸ The Act also considers access to biological and genetic resources: there must be free and prior informed consent from Indigenous Cultural Communities before access can be given to ancestral lands, and the biological resources and related Indigenous knowledge located thereon.²⁶⁹

²⁶³ *Haka Ka Mate Attribution Act 2014* (New Zealand) s 9(3) & 10(1)(a).

²⁶⁴ *Protected objects* Manatū Taonga Ministry for Culture & Heritage (25 May 2021) <<https://mch.govt.nz/nz-identity-heritage/protected-objects>>

²⁶⁵ *Ibid.*

²⁶⁶ *The Constitution of the Republic of the Philippines*, art 14 & s17.

²⁶⁷ *Indigenous Peoples' Rights Act 1997* (Philippines) Republic Act No 8371 <<https://www.officialgazette.gov.ph/1997/10/29/republic-act-no-8371/>>; An Act to recognise, protect and promote the rights of Indigenous cultural communities/Indigenous peoples, creating a national commission on Indigenous people, establishing implementing mechanisms, appropriating fund therefore, and other purposes.

²⁶⁸ *Indigenous Peoples Rights Act of 1997*, s 32.

²⁶⁹ *Ibid* s 35.

Case Study: Thailand promoting intangible cultural heritage

In 2016, Thailand passed the *Promotion and Conservation of Intangible Cultural Heritage Act*.²⁷⁰ Under the Act, the intangible heritage that is protected includes:

- folk literature and languages
- performing arts
- social practices, rituals, customs and festivals
- knowledge and practice concerning the nature of the universe
- traditional craftsmanship
- folk plays, folk sports and martial arts²⁷¹

The Act empowers the Promotion and Conservation of Intangible Cultural Heritage Commission to consider and give approval to the listing of intangible cultural heritage.²⁷² In fact, the list was already established, but the significance of the Act was to set up the roles and responsibilities of government and sub-jurisdictional committees in the process of listing and managing intangible cultural heritage.²⁷³ Thailand currently has 354 items on the intangible cultural heritage register.²⁷⁴ This includes Mat Mi cloth, text on Thai cats, the traditional gold jewellery of Petchaburi and Muai Thai (Thai boxing).²⁷⁵

Case Study: The government's duties to protect objects of advancement of culture in Indonesia

Under the *Law No 5 of 2017 concerning the Advancement of Culture* in Indonesia, TK, rites, traditional technology, arts and language are all considered *Objects of Advancement of Culture*.²⁷⁶ The law confirms the instruments by which Advancement of Culture is guided:

²⁷⁰ Department of Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021 (Thailand Survey); found a tentative translation online, *Promotion and Conservation of Intangible Cultural Heritage Act 2016* (Thailand) B.E. 2559.

²⁷¹ *Promotion and Conservation of Intangible Cultural Heritage Act 2016* (Thailand) B.E. 2559, s 4.

²⁷² *Ibid*, s 10(7).

²⁷³ Sae-Wang, Ratchaneekorn, 'Cultural Heritage Management in Thailand: Common Barrier and the Possible Way to Survive' (2017) 17(2) *Silpakorn University Journal of Social Sciences, Humanities, and Arts* 133, 143.

²⁷⁴ Department of Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021 (Thailand Survey).

²⁷⁵ Sae-Wang, Ratchaneekorn, 'Cultural Heritage Management in Thailand: Common Barrier and the Possible Way to Survive' (2017) 17(2) *Silpakorn University Journal of Social Sciences, Humanities, and Arts*, 133, 142; Intangible Cultural Heritage, *Traditional Craftsmanship – Mat Mi Cloth*, <<http://ich.culture.go.th/index.php/en/ich/traditional-craftsmanship/241-craft/215-mat-mi-cloth>>; Intangible Cultural Heritage, *Traditional Craftsmanship – Text on Thai Cats*, <<http://ich.culture.go.th/index.php/en/ich/folk-literature/252-folk/230-text-on-thai-cats>>; Intangible Cultural Heritage, *Traditional Craftsmanship – Traditional Gold Jewellery of Petchaburi*, <<http://ich.culture.go.th/index.php/en/ich/traditional-craftsmanship/241-craft/206-traditional-gold-jewellery-of-petchaburi>>; Intangible Cultural Heritage, *Traditional Craftsmanship – Muai Thai*, <<http://ich.culture.go.th/index.php/en/ich/folk-sports-games-and-martial-arts/261-sport/232-muai-thai>>.

²⁷⁶ *Law No 5 of 2017 on the Advancement of Culture 2017* (Indonesia) art 5.

- regency/municipal Culture White Paper
- provincial Culture White Papers
- culture Strategy; and
- advancement of Culture Master Plan.²⁷⁷

Under the law, the Central Government and/or Regional Government is obligated to record and document Objects of Advancement of Culture.²⁷⁸ They further have an obligation to safeguard Objects of Advancement of Culture, by:

- continually updating the data in the Integrated Database on Culture;
- inheriting Objects of Advancement of Culture to the next generation; and
- promoting Objects of Advancement of Culture as world cultural heritage.²⁷⁹

Although how these measures are achieved, is left to regulation.²⁸⁰

Note: the Integrated Database is a system of data on Culture that integrates all data from various sources. It is discussed further in Section 5.4.²⁸¹

4.3.6. What are the benefits of laws that protect traditional medicines?

Traditional medicine is a form of TK. It is also a form of TK that is likely to draw a significant amount of attention from researchers and users, and could potentially have commercialisation opportunities. There is also a GR consideration, given that a lot of the medicines are likely to be derived from biological resources that are cultivated and grown in the regions that have developed the TK. This puts traditional medicine – TK and GR – at high risk of misappropriation.

The AANZFTA Parties have a great wealth of traditional medical knowledge, and so it is logical that many countries have traditional medicinal laws in place. The Philippines has the *Traditional and Alternative Medicine Act of 1997* and Lao PDRs has the *Laws on Medicines and Medical Products 2011*.

This section examines several other traditional medicines legislation within the AANZFTA region.

Case Study: Myanmar's *Traditional Drug Law (1996)*

Myanmar's *Traditional Drug Law* refers to both 'Traditional Drugs' and 'Traditional Medicine'. While a Traditional drug is for the diagnosis, prevention and treatment of diseases and promotion of health in people and animals, Traditional Medicine refers to medicine for the physical well-being and longevity of people in accordance with one of the four nayas of traditional medicine: Desana naya, Bethitsa naya, Netkhata vedanaya and Vissadara naya.²⁸² Under the Act,

²⁷⁷ Ibid art 8.

²⁷⁸ Ibid art 17.

²⁷⁹ Ibid art 22.

²⁸⁰ Ibid Art 23.

²⁸¹ Ibid art 1(12).

²⁸² *Traditional Drug Law 1996* (Myanmar) The State law and Order Restoration Council Law No. 7/96, s 2(a)-(b).

traditional drugs may be registered with the Board of Authority.²⁸³ If a person wants to manufacture a traditional drug they must apply to the Board for a licence.²⁸⁴

Case Study: Identification of controlled herbs in Thailand

In Thailand, there is the Protection and Promotion of *Traditional Thai Medicinal Intelligence Act B.E. 2542 (1999)*. This law allows for the Minister to issue a notification identifying particular herbs that are valuable for study and research, have economic significance or may become extinct.²⁸⁵ Once the notification is issued, that herb is then known as a controlled herb and any person wishing to export controlled herbs or sell or transform them for commercial purposes must first obtain a licence.²⁸⁶ State agencies undertaking research need not apply for a permit but must follow the rules and procedures set by the Minister.²⁸⁷

Protections afforded under this Act are supplemented with the following Ministerial Notifications:

- The Ministerial Notification prescribing the National Textbook on Thai Traditional Medicine and Recipe on Thai Traditional Medical Drug B.E. 2558 (2015)
- The Ministerial Regulations on Application for Permission and Limitation of Rights and Compensation for Use of Thai Traditional Medicine Recipes B.E.2588 (2015)

4.3.7. Resale Royalties: Economic empowerment for artists

The resale royalty is the right of an artist to share in the increased proceeds of their works when they are resold. The right is optional in the *Berne Convention of the Protection of Literary and Artistic Works*.²⁸⁸ Originating in France, countries were slow to introduce these rights into their laws, but in the last 20 years this has increased. There are approximately 80 countries with resale royalty rights including Germany, the United Kingdom, and India. In the ASEAN region the following countries have resale royalty schemes, Australia and Philippines.

In Australia, Indigenous artists' works are often sold by collectors at higher prices than they were first purchased. The Indigenous artists do not benefit from the increased amounts that collectors

²⁸³ Ibid s 10.

²⁸⁴ Ibid s 17.

²⁸⁵ *Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542, s 44; Sirakarn Meeklam, 'Protection of Traditional Knowledge Associated with Plant Genetic Resources: A Comparative study of Thai Law and Indian Law' (2018) 5 *Thammasat Business Law Journal* (available at <https://so05.tci-thaijo.org/index.php/TBLJ/article/view/112568/87679>).

²⁸⁶ *Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542, s 46; Sirakarn Meeklam, 'Protection of Traditional Knowledge Associated with Plant Genetic Resources: A Comparative study of Thai Law and Indian Law' (2018) 5 *Thammasat Business Law Journal* (available at <https://so05.tci-thaijo.org/index.php/TBLJ/article/view/112568/87679>).

²⁸⁷ *Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542, s 48; Sirakarn Meeklam, 'Protection of Traditional Knowledge Associated with Plant Genetic Resources: A Comparative study of Thai Law and Indian Law' (2018) 5 *Thammasat Business Law Journal* (available at <https://so05.tci-thaijo.org/index.php/TBLJ/article/view/112568/87679>).

²⁸⁸ *Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)*, opened for signature 31 January 1972 (entered into force 19 November 1984) art 14.

receive. This was an issue for Indigenous artists whose works sold originally for small amounts, then were resold in the secondary markets for much more. Since 2010, the *Resale Royalty Right for Visual Artists Act 2009* (Commonwealth of Australia) has provided all artists with a right to receive 5% of the commercial resale price. The work must be resold for over \$1,000. The scheme has generated more than \$9.8 million in royalties which are collected by the Copyright Agency. Over 65% of the artists receiving the royalties are Aboriginal or Torres Strait Islander artists, with 38% of the total value of all royalties. 17 of the top 50 artists who receive money under the scheme are Indigenous.²⁸⁹

In the Philippines, the Intellectual Property Code provides artists the right to proceeds of subsequent transfers of their copyright works.²⁹⁰ The right can be exercised by an accredited collective management organisation. It is not clear from our research whether the right in the Philippines has the same impact as for Indigenous Australian artists.

The NZ government considered the introduction of the resale royalties in 2007 but the bill was not passed.²⁹¹

In summary, the resale right has some scope to provide royalties to Indigenous and traditional artists whose works are sold for small amounts and are resold by collectors at higher prices. The laws are not specifically focused on Indigenous artists, however, in Australia, given that the art market is dominated by Indigenous artists, there has been a shift to enable sharing of higher prices with the Indigenous artists and their families.

4.4. International cooperation

A large amount of misappropriation of GR, TK and TCE occurs outside of a country. Therefore, international cooperation is required to stop these infringements.

All of the AANZFTA parties are signatories to the Trade-Related Aspects of Intellectual Property Rights (TRIPs). The objective of the TRIPs Agreement is to ensure the protection of intellectual property rights within the course of international trade, and ensure that these procedures do not become a barrier to legitimate international trade.²⁹² The TRIPs Agreement operates on the principles of National Treatment and Most Favoured National Treatment. National Treatment means:

²⁸⁹ Copyright Agency, *Resale Royalty*, <<https://www.resaleroyalty.org.au/Default.aspx>> figures at 31 May 2021.

²⁹⁰ Originally the right was included in the 1972 in the IP code, but was implemented in July 2020 through rules and regulations; Miguel de Leon, Jose *Philippines: Enriching the lives of artists in the Philippines through the use of Resale Right* (2 September 2020) Mondaq, <https://www.mondaq.com/copyright/981186/enriching-the-lives-of-artists-in-the-philippines-through-the-use-of-resale-right>.

²⁹¹ Ministry for Culture and Heritage, *A Resale Royalty Right for Visual Artists – Options for its possible application to New Zealand*, Discussion Paper (2017) (available at <https://mch.govt.nz/sites/default/files/ResaleRoyaltyPublicDiscussionPaper.pdf>); Depot Artspace, *Artist Resale Royalties* (1 December 2020) The Big Idea <<https://www.thebigidea.nz/stories/media-releases/229087-artist-resale-royalties>>

²⁹² *Trade-Related Aspects of Intellectual Property Rights* ('TRIPs'), art 7.

*Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.*²⁹³

While Most Favoured National Treatment means:

*With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.*²⁹⁴

All this amounts to is that, in matters related to IP in trade agreements, any protections afforded to one party, must be afforded to all parties. So when two or more countries enter into a free trade agreement and include consideration of GR, TK and TCE, they have three alternatives:

- consider IP protections for GR, TK and TCE, and in doing so, follow the minimum protections set out in TRIPS;
- provide IP protections to GR, TK and TCE within the scope of TRIPs but affording protections over and above TRIPS minimums (often called TRIP plus); or
- include terms related to the protection of GR, TK or TCE, but have those protections be outside the scope of TRIPs.

What falls within, or outside the scope of TRIPS can be contentious.²⁹⁵ However, for the most part, IP protections for GR, TK and TCE either follow TRIPS or are TRIPS plus, whereas *sui generis* protections are outside the scope of TRIPS. For example, if two parties include in their trade agreement an undertaking that they will amend their existing patent law to include a patent disclosure for TK, this will be considered TRIPS plus and the National Treatment rule will be triggered. This will mean that if Country A agrees with Country B to amend their patent act to include a compulsory disclosure of an invention derived from TK, then Country A must afford this additional protection not just to residents of Country B but to residents of any other TRIPS Agreement country, provided they otherwise satisfy the standing requirements.

Note, execution of the trade agreement is only the first step in implementation of protection. The country must ratify it into domestic law before a protection can be enforced.

So how have free trade agreements (**FTAs**) been used by countries to protect GR, TK and TCE? In general, countries generally enter into FTAs when they feel that the multilateral process is progressing too slowly and they are eager to achieve their policy objectives.²⁹⁶ This means that the terms of an FTA depend largely on policy objective alignment and the relative bargaining power of the parties.

In fact, it seems that to date, FTAs have not been used in significant ways to afford protections for GR, TK and TCE. In general, TK protections are carved out of any agreement, and it is left to the individual party to address internally.²⁹⁷ This was the case in the 2011 China-Costa Rica FTA in which the parties agree to discuss further measures relating to disclosure of origin and prior

²⁹³ TRIPs, art 3(1).

²⁹⁴ TRIPs, art, 4.

²⁹⁵ Susy Frankel, 'Attempts to protect indigenous Culture Through Free Trade Agreements' (2011) *Victoria University of Wellington*, 34 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952969).

²⁹⁶ Ibid. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952969

²⁹⁷ Susy Frankel, 'Attempts to protect indigenous Culture Through Free Trade Agreements' (2011) *Victoria University of Wellington*, 34 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952969)

informed consent.²⁹⁸ The language in the 2008 CARIFORUM FTA entered into by the EU and Caribbean countries, is moderately stronger but not by much. The parties agree that they *may* require that a patent applicant disclose the origin of biological material used in the invention that is the subject of the application.²⁹⁹ *May* is of course the key word here and this agreement seems like a missed opportunity given that all the members belong to the CBD and so in theory, all had an intention to incorporate disclosure of origin protections for GR into their laws.³⁰⁰

The 2009 US-Peru FTA is good evidence of imbalanced bargaining power leading to the stronger party determining the terms of an FTA.³⁰¹ The US is not a member of CBD, but Peru is, and has always advocated for patent disclosure provisions for the protection of TK and GR at the TRIPS Council. However, the final wording of the FTA evidently reflects the US position at the TRIPS Council:

*The Parties recognise that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from the use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers*³⁰²

This essentially leaves it to the responsibility of the private parties to negotiate fair terms for access to GR and TK.

As suggested earlier, FTAs have not made significant progress in the protection of GR, TK and TCE. That said, the terms of an FTA are largely guided by the policy objectives of the parties and their relative bargaining power. This means that where parties have a generally agreed understanding of best practice protections for GR, TK and TCE, FTAs are likely to be a very useful mechanism in the protection of GR, TK and TCE. Although of course, success also depends on the individual countries ratifying the terms of the FTA into their domestic law.

The GRTKTCE Survey asked the AANZFTA Parties specifically about the challenges to regional co-operation. The lack of regional co-operation through treaties, and best practice mechanisms was cited by Lao PDR, Australia, and the Philippines.³⁰³ Thailand went further and noted a need for databases, better information sharing processes in the region (to detect misappropriation),

²⁹⁸ *China-Costa Rica Free Trade Agreement*, WTO Doc WTREG310 (8 April 2010, adopted 1 August 2011).

²⁹⁹ *Economic Partnership Agreement between the CARIFORUM States and the European Community*, L 289/1/4, signed 15 October 2008 (entered into force 29 December 2008) (available at <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2008034>); Entered into force by EU and Caribbean countries.

³⁰⁰ Susy Frankel, 'Attempts to protect indigenous Culture Through Free Trade Agreements' (2011) *Victoria University of Wellington*, 34 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952969).

³⁰¹ *United States – Peru* 12 April 2006, adopted 1 February 2009) (Free Trade Agreement) (available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>).

³⁰² *States – Peru* 12 April 2006, adopted 1 February 2009) (Free Trade Agreement) (available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>).

³⁰³ Department of Intellectual Property (Lao PDR Survey), IP Australia (Australia Survey) & Intellectual Property Office of the Philippines, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Philippines Survey).

and better regional and international co-operation in enforcement.³⁰⁴ Brunei noted a need for further consultation with stakeholders.³⁰⁵

Other responses enunciated the challenges to creating norm setting instruments. These challenges fell into three themes:

Diversity of Indigenous and Local Community cultural expression leading to uncertainty around several key definitions that would need to be agreed in any international instrument

Australia noted the diversity of Indigenous communities; Viet Nam noted a lack of definition on key terms (for example Traditional Knowledge).³⁰⁶

Overlapping GR, TK and TCE across a number of jurisdictions

Malaysia noted this, as did Indonesia.³⁰⁷

Countries having different agendas when making law and policy

This was noted by New Zealand and Viet Nam.³⁰⁸

4.4.1. Are regional model laws useful?

While draft provisions provided by regional models have no formal status, they illustrate useful perspectives and frameworks for member states wishing to enact legislation for the protection of TK and TCE. As there is no prescribed form to regional agreements or method as to how they should be implemented into domestic laws, they may be applied flexibly to different circumstances and contexts.³⁰⁹ This allows member states to use regional models as a point of reference in setting their own objectives and goals, and in negotiating with relevant stakeholders. Ultimately,

³⁰⁴ Department of Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Thailand Survey).

³⁰⁵ Counsel from Brunei Intellectual Property Office (BruiPO), Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Brunei Survey).

³⁰⁶ IP Australia (Australia Survey), Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) and Intellectual Property Office of Viet Nam Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Viet Nam Survey).

³⁰⁷ Intellectual Property Corporation of Malaysia, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Malaysia Survey) and The Ministry of Law and Human Rights, Directorate General of Intellectual Property (DGIP), The Ministry of Law and Human Rights, Directorate General of Culture, Ministry of Education and Culture Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Indonesia Survey).

³⁰⁸ Ministry of Business, Innovation and Employment, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (New Zealand Survey) and Intellectual Property Office of Viet Nam Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Viet Nam Survey).

³⁰⁹ Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, (Report commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies and Aboriginal and Torres Strait Islander Commission, Michael Frankel & Company, 1998) p 219.

these models provide regional consensus on the topic, and a starting point for member states wishing to enact legislation for the protection of traditional knowledge and expressions of culture.

Several submissions to the Our Culture: Our Future Report on Australian Indigenous Cultural and Intellectual Property Rights (the Report) noted that regional agreements may be an effective way of achieving Indigenous self-determination in political climates where legislative recognition of sovereign rights remains unlikely.³¹⁰ However, limitations exist for regional models as a stand-alone protection. The Report's workshop on Biodiversity Group and Environment of Australia noted that in the Australian context:

*Only when indigenous rights are recognised will meaningful and binding regional agreements on the management and use of Australia's biodiversity be reached.*³¹¹

Regional models have been used by the Andean region, the African Regional Intellectual Property Organization (ARIPO), countries in the Pacific region, members of the Association of Southeast Asian Nations (ASEAN) and others.

The Andean Region

The Andean region, consisting of Bolivia, Columbia, Ecuador, and Peru is one good example of both the utility and limitations of regional models in protecting GR, TK and TCE. In the 1990s the region called for the better regulation of environmental issues, arising out of the context of the CBD and Bonn Guidelines. Consequently, the Andean Community approved Decision 391 in 1996, which established a regime for access to genetic resources within the region.³¹² The model is still in force today and aims to ensure that benefits generated as a result of access to GR and associated TK are shared with the origin countries.³¹³ It establishes measures which build upon the minimum standards of CBD, and directly link the 'access regime' to IP. For instance, the regime establishes that for member countries, the granting of IP rights is conditional and dependant on the compliance with disclosure and prior informed consent requirements under the regulation.³¹⁴ In cases of non-compliance, member countries affected *may* request nullification and bring action in countries which have conferred those rights or granted protective title documents.³¹⁵

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² *Decision No. 391 Establishing the Common Regime on Access to Genetic Resources 1996* (Andean Community) <https://www.wipo.int/tk/en/databases/tklaws/articles/article_0169.html>.

³¹³ Muller Manuel Ruiz, 'Regulating Bioprospecting and Protecting Indigenous Peoples Knowledge in the Andean Community: Decision 391 and its Overall Impacts in the Region' (Research Paper, UNCTAD, 30 October 2000) (available at <http://www.biotrade.org/ResourcesPublications/Regulating%20bioprospecting%20and%20protecting%20indigenous%20knowledge%20in%20the%20Andean%20Community.pdf>) in Sophia Twarog *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions*, UN Doc UNCTAD/DITC/TED/10 (2004) (available at https://www.researchgate.net/profile/Promila-Kapoor-Vijay/publication/321587774_Protecting_and_promoting_Traditional_Knowledge/data/5a280cfa6fdcc8e8671a136/Protecting-and-promoting-Traditional-Knowledge.pdf#page=261).

³¹⁴ Joshua D. Sarnoff and Carlos M. Correa, *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications*, 7th Conf, UN Doc UNCTAD/DITC/TED/2004/14 (15 February 2005) 7 <https://unctad.org/system/files/official-document/ditcted200514_en.pdf>.

³¹⁵ Ibid.

In September 2000 the Andean Community Decision 486 for the Common Regime on Industrial Property ³¹⁶ was approved, which consolidated the disclosure provisions of Decision 391 by establishing legally binding protections to intellectual property rights.³¹⁷ Articles 26(h) and (i) and 75(g) and (h) of the Decision establish that where an applicant for a patent has used GR, or associated TK, or has produced something derived from it, they *must* disclose the origin and demonstrate a legal right to use GR and TK in patent applications. A failure to demonstrate prior informed consent will result in the patent being declared null and void.³¹⁸

The available evidence suggests that most member states are either in the process of recognising rights to TK or have incorporated TK and TCE provisions into their IP legislative frameworks.³¹⁹ However, based on current evidence, the protective model law prescribed by Decision 486 has not yet been made operational in Bolivia, Columbia, and Ecuador.³²⁰ Peru is the only example of the swift and direct adoption of both Decision 391 and 486.³²¹ The year after Decision 391 was approved, Peruvian Law No. 26838 on Conservation and Sustainable Use of Biological Diversity was enacted, recognising the rights and authority of the native, Afro-American and local communities to control and access TK; the intra-generational nature of TK and the responsibility to protect TK and promote TK for present and future generations.

Peru again implemented Peruvian Law No. 27811 (Law 28811) for Protection of Collective Knowledge of Indigenous Peoples the year following Decision 486. Law 27811 establishes measures to achieve the defensive protection of TK through a system of registers of TK

³¹⁶ *Decision No. 486 Agreement Establishing the Common Industrial Property Regime*, signed 14 September 2000 WIPO EC109 (entered into force 1 December 2000) <<https://wipolex.wipo.int/en/legislation/details/18914>>.

³¹⁷ *Article 27.3(B), Relationship Between The TRIPS Agreement And The CBD And Protection Of Traditional Knowledge and Folklore*, WTO Doc IP/C/W/447 (8 June 2005) (Communication from Peru) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=74743,70854,66392,71013,62129,56741,75819,47775,77543,71998&CurrentCatalogueIdIndex=8&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.

³¹⁸ *Ibid.*

³¹⁹ *Law No. 1322 of April 13, 1992 on Copyright* (Bolivia); *Law No. 459 of December 19, 2013, on Ancestral Traditional Bolivian Medicine* (Bolivia); *Law No. 23 of January 28, 1982* (Columbia) on *Copyright*; *Law No. 1143 of 2007* (Columbia); *Law No. 1166 of 2007* (Columbia); *Organic Law on Culture 2016* (Ecuador); *Organic Code on the Social Economy of Knowledge, Creativity and Innovation 2016* (Ecuador).

³²⁰ Manuel Ruiz, Muller '*Regulating Bioprospecting and Protecting Indigenous Peoples' Knowledge in the Andean Community: Decision 391 and its Overall Impacts in the Region*' (30 October 2000) in Sophia Twarog and Promila Kapoor, *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions*, UN Doc UNCTAD/DITC/TED/10 (2004), p 250 <https://www.researchgate.net/profile/Promila-Kapoor-Vijay/publication/321587774_Protecting_and_promoting_Traditional_Knowledge/data/5a280cfa6fdcc8e8671a136/Protecting-and-promoting-Traditional-Knowledge.pdf#page=261>.

³²¹ Manuel Ruiz, Muller '*Regulating Bioprospecting and Protecting Indigenous Peoples' Knowledge in the Andean Community: Decision 391 and its Overall Impacts in the Region*' (30 October 2000) in Sophia Twarog and Promila Kapoor, *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions*, UN Doc UNCTAD/DITC/TED/10 (2004), p 246-247 <https://www.researchgate.net/profile/Promila-Kapoor-Vijay/publication/321587774_Protecting_and_promoting_Traditional_Knowledge/data/5a280cfa6fdcc8e8671a136/Protecting-and-promoting-Traditional-Knowledge.pdf#page=261>.

associated with GR, licences, and compensation mechanisms.³²² The disclosure of the origin requirements was also adopted in the Second Supplementary Provision of Law 27811, requiring:

Where a patent application relates to products or processes obtained from collective knowledge, the applicant shall be required to submit a copy of the licence contract, as a prerequisite for the granting of the relevant right, unless the collective knowledge concerned is in the public domain. Failure to comply with this obligation shall be grounds for refusing to grant the patent or, where appropriate, declaring it void.

Peru also went further in 2004, passing Law No. 28216 Act on the Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples (Law 28216). This law established a National Commission for the Protection of Access to Biological Diversity and to the Collective Knowledge of Indigenous People. The objective of the Commission is to protect the TK against acts of 'biopiracy'. This term was defined in Law 28216 as:

*Unauthorised and non-remunerated access to and use of biological resources or collective knowledge of indigenous peoples... without the relevant authorisation.*³²³

Pacific Region Model laws

In 2002, the Pacific Region took similar steps by developing the *Model Law for the Protection of Traditional Knowledge and Expression of Culture* (The Model Law TKEC)³²⁴ and *Model Law on Traditional Biological Knowledge, Innovation and Practices* (Model law on TBKIP).³²⁵ Both models establish a new range of statutory rights for traditional owners as owners of their TK, TCE, innovations and practices related to traditional biological knowledge. The Pacific Region also provides a draft law and framework for protection through policy and legislative provisions.³²⁶ Some key provisions of the Pacific model include the establishment of moral and traditional cultural rights under section 7 and 13, and the requirement of prior informed consent of traditional owners in accordance with section 23(1) or 25(5). Section 12 of the model act provides benefit-

³²² Article 27.3(B), *Relationship Between The Trips Agreement And The CBD And Protection Of Traditional Knowledge and Folklore*, WTO Doc IP/C/W/447 (8 June 2005) (Communication from Peru) p 9 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=74743,70854,66392,71013,62129,56741,75819,47775,77543,71998&CurrentCatalogueIdIndex=8&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.

³²³ Law No. 28216 *Model Law on the Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples 2004* (Peru); Law No. 28216 *Model Law on the Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples 2004* (Peru).

³²⁴ *The Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, Secretariat of the Pacific Community, Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (signed and entered into force in 2002) <<https://www.wipo.int/edocs/lexdocs/laws/en/spc/spc002en.pdf>>.

³²⁵ *Model Law on Traditional Biological Knowledge, Innovation and Practices 2001* (Pacific Community); Secretariate of the Pacific Community, Secretariate of the Pacific Regional Environment Programme and World Intellectual Property Organization, *Traditional Knowledge Implementation Action Plan* (March 2009) Pacific Regional Environment Programme <<https://www.sprep.org/attachments/VirLib/Global/traditional-knowledge-action-plan.pdf>>.

³²⁶ *Model Law for the Protection of Traditional Knowledge and Expression of Culture 2002* (Pacific Community) Regional Framework for the Protection of Traditional Knowledge and Expression of Culture <<https://www.wipo.int/edocs/lexdocs/laws/en/spc/spc002en.pdf>>.

sharing provisions in user-agreements where the use of TK is for a commercial purpose. Lastly, Part 5 of the model law outlines enforcement provisions, including the creation of civil and criminal offences or sanctions against improper use and acts or omissions inconsistent with the moral rights of traditional owners (including importation and exportation infringements under section 29(1)). Unlike the Andean Region however, the Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea, and Vanuatu also adopted a Regional Traditional Knowledge Implementation Action Plan (“the Action Plan”) in 2009.³²⁷ This was to assist member countries with the implementation process. The expected outputs of the Action Plan encompass among other things the drafting and implementation of national policy and legislation addressing IP issues relevant to the protection of TK & TCE, including database development; participation in workshops on IP and the commercialisation of TK & TCE; and participation at IGC Meetings.

This drafting of policy and legislation on the Model Laws was to occur in two phases, beginning in 2009 and closing in 2015.³²⁸ So far, at least six countries have proceeded to the drafting stage, including Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea and Vanuatu.³²⁹ However, only the Cook Islands and Vanuatu have begun directly implementing the Model Law.³³⁰ Meanwhile, other member states such as Fiji,³³¹ and Papua New Guinea³³² have implemented provisions into their existing intellectual property laws.

The Swakopmund Protocol

The African regional framework was adopted in August 2010 via the Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore (the Swakopmund Protocol).³³³ This was signed by the nine ARIPO member states.³³⁴ The Swakopmund Protocol establishes provisions and model law for the protection of TK and TCE, equitable benefit sharing and the recognition of rights. To date, Kenya³³⁵ and Zambia³³⁶ have adopted the model laws.

³²⁷ *Pacific Islands Forum Countries Traditional Knowledge Implementation Action Plan*, Secretariate of the Pacific Community and Secretariate of the Pacific Regional Environment Programme and World Intellectual Property Organization (entered into force March 2009)

<<https://www.sprep.org/attachments/VirLib/Global/traditional-knowledge-action-plan.pdf>>.

³²⁸ *Ibid.*

³²⁹ Miranda Forsyth, ‘Cultural Economics and Intellectual Property: Tensions and Challenges for the Region’ (2015) 2(2) *Asia & the Pacific Policy Studies* 356, 358.

³³⁰ *Traditional Knowledge Act 2013* (Cook Islands); *Act for the Protection of Traditional Knowledge and Expressions of Culture 2020* (Vanuatu) as passed through parliament in early 2021.

³³¹ *Copyright Act 1999* (Fiji).

³³² *Copyright and Neighboring Rights Act 2000* (Papua New Guinea).

³³³ *Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore*, ARIPO (signed and entered into force 9 August 2010 and amended on 6 December 2016)

<<https://www.aripo.org/wp-content/uploads/2019/06/Swakopmund-Protocol-on-the-Protection-of-Traditional-Knowledge-and-Expressions-of-Folklore-2019.pdf>>.

³³⁴ ARIPO member states include Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia and Zimbabwe.

³³⁵ *The Protection of Traditional Knowledge and Cultural Expressions Act 2016* (Kenya) Act No. 33 of 2016.

³³⁶ *The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act 2016* (Zambia) Act No. 16 of 2016; *Patents Act 2016* (Zambia) Act No. 40 of 2016, s 28.

Meanwhile, Botswana,³³⁷ Ghana,³³⁸ Lesotho,³³⁹ Liberia,³⁴⁰ Mozambique,³⁴¹ Namibia,³⁴² and Zimbabwe³⁴³ all remain reliant on existing intellectual property laws.

Ultimately, regional agreements and model laws are dependent on the willingness of member states to implement these models into their domestic laws. Nonetheless, they provide a strong and contextually relevant starting point for members states to implement these laws, and an encouraging political climate for engagement.

4.4.2. International Instruments and Free Trade Agreements in the AANZFTA Area

As evidenced by Table 1 AANZFTA Parties are active participants in international instruments that impact the management of GR, TK and TCE. All parties are members of the Food and Agriculture Organisation, WIPO and the WTO. Moreover, all countries are signatories to the Convention on Biological Diversity and the United Nations Declaration on the Rights of Indigenous Peoples. There is also almost universal subscription to the Madrid Protocol and the Nagoya Protocol. This is evidence of active participation in the international theatre of best practice IP management as it has evolved over the years.

In addition to multilateral agreements, many AANZFTA Parties have pursued free trade agreements within, and outside, the ASEAN region. The AANZFTA Agreement was discussed in Section 1.2.2, and of course this Comparative Study was written as part of the AANZFTA Economic Cooperation Support Programme. Two other particularly noteworthy agreements in the region are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) and the Regional Comprehensive Economic Partnership (**RCEP**). Parties to the CPTPP include Australia, Brunei, Malaysia, New Zealand and Viet Nam. All countries surveyed are signatories to RCEP.

The CPTPP is a separate treaty that builds on the provisions of the original Trans-Pacific Partnership (**TPP**). The TPP is signed, but not yet in force, but the CPTPP is signed and in force. The CPTPP is noteworthy for its IP chapter (Chapter 18). Its objective is the protection of IP rights, and promotion and dissemination of technological innovation, while promoting social and economic welfare.³⁴⁴ It makes specific reference to GR and related TK, obligating parties to make

³³⁷ *Copyright and Neighboring Rights Act 2000* (Botswana) as amended by Act No. 6 of 2006 ch 68:02; *Industrial Property Act 2010* (Botswana) Act No. 8 of 2010.

³³⁸ *Copyright Act 2005* (Ghana) Act 690; *Traditional Medicine Practice Act 2000* (Ghana).

³³⁹ *Copyright Order 1989* (Lesotho) Order No.13 of 1989.

³⁴⁰ *Intellectual Property Act 2016* (Liberia).

³⁴¹ Approving the Mozambique's Cultural Policy and the Strategy for its Implementation, Res 12/97 Council of Ministers (1997).

³⁴² *Industrial Property Act 2012* (Namibia) Act No. 1 of 2012; *Community Courts Act 2003* (Namibia) Act No. 10 of 2003; *Traditional Authorities Act 2000* (Namibia) Act No. 25 of 2000; *Council of Traditional Leaders Act 1997* (Namibia) Act No. 13 of 1997.

³⁴³ *Copyright and Neighbouring Rights Act 2004* (Zimbabwe) Chapter 26:05, as amended up to Act No. 32 of 2004.

³⁴⁴ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature on 8 March 2018, ATS 23 (entered into force on 30 December 2018) ('CPTPP') 18.2.

efforts to enhance their understanding of the issue connected with TK and GR.³⁴⁵ It also draws the link to patent law. It encourages the use of databases to determine prior base, and providing rights applicants with an opportunity to disclose the source of the materials that is the subject matter of the application.³⁴⁶

The RCEP is the world's largest free trade agreement. In fact, the RCEP uses extremely similar language to the CPTPP when making provision for genetic resources, traditional knowledge and folklore, particularly in relation to taking into account, as part of the prior art base, publicly available information about TK, encouraging opportunities for source disclosure in patent applications and use of databases and digital libraries.³⁴⁷

This information is relevant because it indicates the current discussion among the contracting parties and informs the recommendations at the end of this Comparative Study, particularly in relation to patent disclosure and databases.

³⁴⁵ Ibid 18.16(2).

³⁴⁶ Ibid 18.16(3).

³⁴⁷ Regional Comprehensive Economic Partnership ('RCEP'), art 11.53.

Table 2: Summary of AANZFTA Parties participation in international instruments and free trade agreements

International Instruments											
	Australia	Brunei	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	NZ	Philippines	Thailand	Viet Nam
ASEAN Framework Agreement on Intellectual Property Cooperation		✓		✓		✓	✓		✓	✓	✓
Convention for the Safeguarding of the Intangible Cultural Heritage		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Convention on the Protection and Promotion of the Diversity of Cultural Expressions	✓			✓	✓			✓			✓
Food and Agriculture Organisation (FAO)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
International Treaty on Plant Genetic Resources for Food and Agriculture	✓		✓	✓	✓	✓	✓		✓	signature only	
International Union for the Protection of New Varieties of Plants (UPOV)	✓							✓			✓
Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks	✓					✓		✓			
Paris Convention for the Protection of Industrial Property	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
Stockholm Convention on establishing the WIPO	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
The Beijing Treaty on Audiovisual Performances			✓	✓					✓		
The Berne Convention for the Protection of Literary and Artistic Works	✓	✓		✓	✓	✓		✓	✓	✓	✓
The Madrid Agreement Concerning the International Registration of Marks (The Madrid Agreement)						✓					✓
The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (The Madrid Protocol)	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation	Signature only	✓	✓	✓	✓	✓	✓	Signature only	✓
The Patent Cooperation Treaty	✓	✓	✓	✓	✓	✓	✓	✓	✓
United Nations Convention on Biological Diversity (CBD)	✓	✓	✓	✓	✓	✓	✓	✓	✓
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)	✓	✓	✓	✓	✓	✓	✓	✓	✓
Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks					✓				
World Trade Organization (WTO) Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓

Free Trade Agreements

	Australia	Brunei	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	NZ	Philippines	Thailand	Viet Nam
ASEAN-People's Republic of China Comprehensive Economic Cooperation	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓
ASEAN-EU Free Trade Agreement	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓
ASEAN-Australia-New Zealand Trade Agreement (AANZFTA)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australia-Hong Kong Free Trade Agreement (AU-HK)	✓										
China-Australia Free Trade Agreement (ChAFTA)	✓										
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) ³⁴⁸	✓	✓				✓		✓			✓
Peru-Australia Free Trade Agreement	✓										
Regional Comprehensive Economic Partnership (RCEP)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

³⁴⁸ (NOTE: all of the AANZFTA Parties who were signatories to the original Trans-Pacific Partnership, have agreed to the CPTPP).

5. Non-legal approaches

5.1. Why consider non-legal options?

At the start of Section 3 we briefly touched on the reasons behind setting policy objectives, specifically, the ethical, environmental and economic imperatives of GR, TK and TCE protection. We return to that discussion now, to contextualise why non-legal options, such as policies, protocols and education programs play such a vital role in filling gaps in the legal and assisting in the implementation of legal protections.

Rapid globalisation and increased online markets have further exacerbated issues in the exploitation of GR, TK, and TCE by allowing businesses to operate outside the traditional jurisdiction of national boundaries. The legal remedies available for the exploitation of GR, TK and TCE are often costly and time consuming. For example, to dispute a copyright matter in Australia can take \$20,000 - \$50,000 for small infringements and from \$300,000- \$500,000 for fully contested proceedings.³⁴⁹ This is prohibitively expensive for many Aboriginal and Torres Strait Islander artists, particularly when the outcome of the case is never certain. Even if an infringement is found, then companies can go into liquidation and avoid paying the costs, as was seen in the case of *Milpurruru v Indofurn* and *ACCC v Birubi*.³⁵⁰ (referred to in Sections 4.1 & 4.2 respectively).

Furthermore, remedies sought may go beyond financial compensation, or are not culturally appropriate. In some instances, it is better to explore other methods of dispute resolution. For example, an apology may suffice, or having exploiters sit down with communities and understand why and how misuse and misappropriation of GR, TK, and TCE is wrong. However, social and political attitudes are slowly starting to shift. There is improved appreciation of the uniqueness and diversity of Indigenous and Local Communities' cultural expressions. Countries are coming to understand the role of their Indigenous and Local Communities in making their own national identity special, and something in which to take pride.

Legal change can be slow, influenced by competing policy levers, and of uncertain outcome. As referred to earlier, there is frequently inadequate representation of Indigenous or Local Communities. Moreover, progress by the WIPO IGC on the draft articles for TK, TCE and GRs are slow. As a result, non-legal measures have been used by Indigenous and Local Communities, governments, individuals, and non-governmental organisations. They are quicker to put into effect, and more flexible.

The most successful non-legal approaches are often linked with educational and consumer awareness. Increasingly, consumers, especially young people, are looking to purchase products that are ethically produced and sourced. There is an increasing expectation that companies act

³⁴⁹ Michael Williams, Rebecca Dun, and Rebecca Smith 'Copyright litigation in Australia: Overview', (2018) *Thomson Reuters Practical Law*.

³⁵⁰ *Milpurruru and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659; *Australian Competition Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595 1.

as global citizens and practice good corporate social responsibility. This gives companies an economic as well as an ethical impetus to shift their practices towards industry standards for best practice when engaging with Indigenous and Local Communities and their knowledge.

Through the rise of social media, companies that do not adapt to this cultural shift can be held accountable through public shaming and negative publicity. The almost ubiquitous nature of social media, and the fact that it is the primary news source for many people, means that instances of exploitation have almost instant mass media coverage and can have significant ramifications for a company's reputation.

Non-legal options can also lead to improvements in legislation and regulation. For example, inventories and defensive databases may be initiated in a research project, or by a community run organisation. However, they can still impact the way the law operates. For example, by opening up the prior art base, or providing copyright protection for materials that have not been recorded in material form, but handed down orally, such as songs.

This section will discuss different non-legal responses and how they combine to provide a web of effective strategies for the protection of GR, TK, and TCE. We focus on steps that can be taken by government departments, community organisation and NGOs to establish best practice norms for engagement with GR, TK and TCE. In fact, a combination of these responses will be required to establish an effective protection network.

5.2. Education & Public Awareness

Education and public awareness campaigns can have a significant positive impact on the protection of GR, TK and TCE. This includes encouraging public debate and conversation over misuse of GR, TK and TCE, and increasing awareness of the legal remedies available for Indigenous and Local Communities who have their GR, TK and TCE misused.

While there is misuse of GR, TK and TCE that is done with intention, and without regard for the community's rights or culture, a lot of cultural harm is being done from a place of ignorance. The infringers are unaware of the cultural impact of their actions. This is where education and awareness programs that promote better practice are useful.

Education and public awareness programs can have different audiences: either they can be aimed at potential infringers of GR, TK and TCE rights, or they can be used to empower Indigenous and Local Communities. To illustrate, refer to Table 3 for some of the ways education and public awareness programs can promote GR, TK and TCE rights, and discourage misuse.

Table 3: Aims of educational and public awareness programs

Education and public awareness programs addressed to the general public	Education and public awareness programs addressed to Indigenous and Local Communities
Education that raises respect for Indigenous and Local Communities	Inform Indigenous or Local Communities of their rights when their copyright is infringed
Raise awareness of the cultural, economic and environmental harm caused by misappropriation	Inform Indigenous and Local Communities of their rights to register the GR, TK or TCE (e.g. registration of intangible heritage, or traditional medicine)
Raise awareness of protocols that should be used as guides for their conduct when working with Indigenous and Local Communities	Educate communities about their negotiating power when it comes to access and benefit sharing agreements
Educate them about their legal obligations (e.g. licensing requirements, and equitable sharing of benefits)	Educate communities about the requirement of free, prior, informed consent, and their right to say no
Educate and promote awareness of ethical collaboration opportunities	Build capacity to start and run commercial ventures using their GR, TK or TCE

Additionally, audiences for a specific educational or public awareness program may be even more defined. For example, a public awareness campaign could be aimed specifically at consumers, or educational programs may be aimed at businesses. There is also a role to play for local and national museums and art galleries in this space. As significant places of cultural expression, often representative of the Indigenous and Local Communities of a country, the opportunity to play a leading role in promoting and selling ethically made artworks can have a trickle-down effect on the tourism sector. This is discussed in the case study of the Australian Museum and Galleries Association *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*.

Public awareness campaigns frequently form *part of* a broader measure. For example, a community organisation might have recently published a protocols document, and so as part of their promotion of the publication, run an event to raise awareness of the protocols.

Campaigns should also contain a ‘call to action’. That is, provide their audience with guidance of next steps to put their new knowledge into practical action. This can include what indicators or markets to look for to determine if a product is made ethically, or for consumers, what to questions to ask a business if the product they are selling is ethically made. Equipping the purchasers with the tools to make informed decisions can have ripple effects on the supply chains.

Case Study: Viet Nam's Cultural Heritage Day and Workshop on the Protection and Promotion of Folklore Values³⁵¹

Viet Nam celebrated Viet Nam Cultural Heritage Day and held workshops celebrating and raising awareness of the cultural values for Indigenous and ethnic communities in the mountainous areas and ethnic minority areas. The Ministry of Culture, Sports and Tourism reported that the conservation and promotion of the unique traditional festivals of ethnic communities in Viet Nam, advance Viet Nam culture and national pride. The support of approximately 80 unique festivals includes investing in, and promoting the values of folk songs, dances and music, traditional clothing, traditional crafts, and the teaching of cultural values.

In addition, the 14th National Assembly, review and re-evaluate policies every 3 years to support the socioeconomic development for Indigenous and ethnic communities, including potential cultural-tourism models.

Case Study: The National Commission on Indigenous Peoples (NCIPP) in the Philippines

The NCIP runs several programs to assist Indigenous and cultural communities to preserve their cultural and historic heritage, whilst also increasing public awareness and respect for rights to protect TK and TCE.³⁵² This includes the *Indigenous Peoples Pagkilala (Recognize)*, *Paggalang (Respect) and Pagtaguyod (Promote) Coffee Table Books*. These three books support the protection of TK and TCE, Pagkilala showcases profiles of Indigenous communities, including their history, and a glimpse into their location and social life. Paggalan features cultural festivals and rituals including birth, death, and societal norms and taboos. Lastly, Pagtaguyod promotes TK and TCE by sharing travel destinations of the communities with a focus on ecotourism. The combination of these books promote the Indigenous and Local Communities, but also protect and assert their rights to their traditional lands, self-governance and empowerment, human rights, and cultural integrity.³⁵³

Case Study: Australian Museum and Galleries Association *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*

The Australian Museum and Galleries Association *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*³⁵⁴ (The Roadmap) is a 10-year plan and commitment to improve Indigenous engagement and employment within the Australian Museum

³⁵¹ *Protection and promotion of folklore values of ethnic minorities* (14 December 2018) Communist Party of Vietnam <<https://dangcongsan.vn/tu-tuong-van-hoa/bao-ve-phat-huy-gia-tri-van-hoa-dan-gian-cua-cac-dan-toc-thieu-so-508094.html>>.

³⁵² *Ancestral Domain/Land Recognition*, Republic of the Philippines National Commission on Indigenous Peoples <https://ncip.gov.ph/?page_id=25>.

³⁵³ *NCIP Launching Indigenous Peoples Pagkilala (Recognize), Paggalang (Respect and Pagtaguyod (Promote) Coffee Table Books* (16 March 2021) Republic of the Philippines National Commission on Indigenous Peoples <<https://ncip.gov.ph/?news=ncip-launching-indigenous-peoples-pagkilala-recognize-paggalang-respect-and-pagtaguyod-promote-coffee-table-books>>.

³⁵⁴ Terri Janke, *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*, Australian Museums and Galleries Association, 2018 <<https://www.amaga.org.au/shop/first-peoples-roadmap-enhancing-indigenous-engagement-museums-and-galleries-hardcopy-version>>.

and Galleries sector. The Roadmap and accompanying Audit Report were written and researched by Terri Janke and Company, and delivered in May 2019. The Roadmap involved two years of extensive, country wide consultation with the museum and gallery sector, and communities. The Roadmap established core principles and achievable outcomes for the sector to achieve better Indigenous engagement and employment across the whole sector.

In addition to the delivery of the Roadmap, Terri Janke and Company presented the Roadmap to a diversity of museums and galleries across the Country and through keynote speeches. This resulted in widespread awareness of the Report and what meaningful Indigenous engagement and employment looks like in practice for those in the sector.

The Roadmap increased the knowledge of those within the sector of the importance of protection of TK and TCE through key markers of what appropriate engagement with TK and TCE looks like in the museum and gallery space. Presenting the Roadmap to museums and galleries following its delivery increased the public awareness of the Roadmap, and how those working in the sector can better protect TK and TCE in their exhibitions and partnerships with Indigenous communities.

Case Study: Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry*, Centre for International Governance Innovation, CIGI Papers Series, no. 213³⁵⁵

The *Curbing Cultural Appropriation in the Fashion Industry* is an in-depth analysis and discussion on cultural appropriation within the fashion industry. The Paper analyses the policy and legal issues in the protection of TCE, through a combination of case studies, and relationship between TCE and IP law. The Paper clarifies the role of cultural exchange, in the exchange of ideas and styles, however it also emphasises the need to curb the amount of appropriation through a principled approach to inform and shape the way that the fashion industry engages with TCE. The Paper concludes with the need to adopt practical solutions, including awareness and education campaigns, support for Indigenous fashion players, and changes to IP laws and principles to better meet the needs of TCE holders.

5.3. Protocols

Protocols can be described as ethical guidelines or codes of conduct that should be followed when engaging with cultural material. Protocols ensure that engagement with cultural material is respectful, maintains cultural integrity and does not put anyone at risk of cultural harm. Within Indigenous and Local Communities there are likely to be already established cultural protocols that could form part of customary law. These would include rules about who had rights to TK, how and when it could be used, and who should share in the benefits derived from TK.

However, increasingly, Indigenous and Local Communities are working with government, and project partners, to regulate how *they* can respectfully engage with TK using written protocol documents. These written protocol guides are practical reference documents that guide people

³⁵⁵ Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry*, Centre for International Governance Innovation, CIGI Papers Series, no. 213. (available at <https://www.cigionline.org/publications/curbing-cultural-appropriation-fashion-industry/>).

outside the community. They include guidance about how to comply with existing laws, but also go beyond strict legal obligations to respect Indigenous and Local Communities' rights and cultural differences. They are flexible and can be tailored to specific industries or projects. Additionally, they can become binding through contracts.

In Australia protocols are commonly used in various sectors including health, research, arts and business. For example, the Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**) *Code of Ethics* and the Australia Council for the Arts *Protocols for using First Nations Cultural and Intellectual Property in the Arts*.

Protocols for Protection of Traditional Knowledge and Traditional Cultural Expression

Example: AIATSIS Code of Ethics (Research)

AIATSIS is the Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**). It is an Australian Government statutory authority established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Commonwealth of Australia).³⁵⁶ AIATSIS hold the world's largest collection dedicated to Australian Aboriginal and Torres Strait Islander cultures and histories, consisting of published and unpublished journals, articles, books, sound recordings, maps, artworks, objects and more.³⁵⁷ AIATSIS has jurisdiction for ethical approval to national and cross-jurisdictional research in Australian Indigenous Studies.

All research projects in Australia that involve Aboriginal and Torres Strait Islander peoples, require ethics review and approval prior to commencement. The AIATSIS Code of Ethics (**Code of Ethics**) are best practice ethical guidelines in Australian Indigenous Studies that work in collaboration with the *National Statement on Ethical Conduct in Human Research, 2007* (**National Statement**).³⁵⁸ The National Statement "clarifies responsibilities of institutions and researchers for ethical design, conduct and dissemination of results of human research, and review bodies in the ethical review of research".³⁵⁹

The Code of Ethics and accompanying guidelines respect Aboriginal and Torres Strait Islander values and worldviews and is structured around four key principles of Indigenous self-determination, Indigenous leadership, impact and value, and sustainability and accountability. Through these four principles, the Code of Ethics provides an effective framework to ensuring the protection of GR, TK, and TCE. The Code of Ethics has shifted away from a consultation and consent process to engagement model. The four principles and research ethics framework gives responsibilities to researchers to engage ethically with Aboriginal and Torres Strait Islander peoples and communities.

A limitation of the Code of Ethics is that AIATSIS are not the only Human Research Ethics Committee that can approve research in Australian Indigenous Studies. If a researcher's

³⁵⁶ *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth).

³⁵⁷ AIATSIS, *Frequently Asked Questions*, <<https://aiatsis.gov.au/about/connect-us/frequently-asked-questions#:~:text=The%20AIATSIS%20Collection%20is%20the,Strait%20Islander%20cultures%20and%20histories.&text=You%20can%20search%20for%20items,for%20some%20other%20media%20types>>.

³⁵⁸ *National Statement on Ethical Conduct in Human Research 2007* (Updated 2018) The National Health and Medical Research Council, the Australian Research Council and Universities Australia (available at <https://www.nhmrc.gov.au/about-us/publications/national-statement-ethical-conduct-human-research-2007-updated-2018>).

³⁵⁹ *Ibid* 6.

institution has their own internal Human Research Ethics Committee, then they can approve the research. Furthermore, if the research is *about*, but not *with* Indigenous peoples, such as only reviewing historical and already published materials, then human research ethics approval is not required. However, the Code of Ethics is the benchmark best practice guidelines, and its ongoing review represents that what is considered best practice is subject to change.

Example: Australia Council for the Arts, Protocols for using First Nations Cultural and Intellectual Property in the Arts

The Australia Council for the Arts, informally known as the Australia Council, are the official arts council, funding and advisory body for the Australian Government. They are the agency body who peer review decisions for funding and supporting the arts in Australia. The Australia Council have had a long working relationship with Indigenous arts, having established an Aboriginal Arts Board since the 1970s, involvement in the Aboriginal arts movement, and have played a significant advocacy role for best practice engagement with Indigenous art.

The Australia Council for the Arts, Protocols for using First Nations Cultural and Intellectual Property in the Arts³⁶⁰ (**the Australia Council Protocols**) are protocols that endorse Indigenous people's rights to their cultural heritage and supports Indigenous creative practice. They provide legal, ethical and moral considerations for the use of Indigenous cultural material. The Australia Council Protocols were first published in 2002, and revised in 2007 and in 2019.

The Australia Council Protocols are for creative practitioners who work with Indigenous artists or engage with Indigenous cultural heritage and are funded by the Australia Council for the Arts. The works in which the Australia Council Protocols can be applied to include the following creative mediums:³⁶¹

- **Visual arts** – through painting, drawing, printmaking, sculpture, photography, crafts and design such as ceramics, textiles and homewares;
- **Music** – in songs and performances. This includes activities such as composing, recording, publishing music, performing and touring;
- **Theatre** – this includes plays, scripted works, music theatre, cabaret, circus and physical theatre, installation theatre performance, puppetry, media-based theatre work, live art, and contemporary interdisciplinary performance;
- **Dance** – such as ballet, contemporary dance, traditional dance, intercultural dance;
- **Literature** – written works such as fiction and non-fiction works, poetry, biographies, and playwriting;
- **Community arts and cultural development** – works or projects with a community focus such as exploring social and environmental themes with collective, shared outcomes. Activities are by, with and for the communities.
- **Multi arts** – or cross-disciplinary art, which are works that touch on multiple art forms. This includes multimedia arts, installation;
- **Emerging and experimental arts** – works and projects that challenge the traditional boundaries of art forms by using new technologies or processes; and

³⁶⁰ Terri Janke and Company, *Protocols for using First Nations Cultural and Intellectual Property in the Arts* (Protocols, The Australia Council for the Arts, 2019) (available at <https://www.australiacouncil.gov.au/programs-and-resources/Protocols-for-using-First-Nations-Cultural-and-Intellectual-Property-in-the-Arts/>).

³⁶¹ Ibid.

- **Events-based projects** – including art and cultural festivals, art fairs, venue-based projects, exhibitions and programming.

The Australia Council Protocols are enforced as conditions to funding grants provided by the Australia Council. In practice, artists who are funded through the Australia Council must follow the protocols as a condition of grant funding or risk losing the financial support for their project. The Australia Council Protocols are an initial point of reference when planning a work with Indigenous artists or using Indigenous cultural materials in works. The Australia Council Protocols are based upon the True Tracks® ICIP Principles developed by Terri Janke and Company and they explain through in-depth case studies of how to apply the True Tracks® Protocols. The Australia Council Protocols have been used nationally and internationally as a framework for engaging with Indigenous cultural material. By providing a framework and methodology for parties to follow, they provide a whole of project approach to safeguard Indigenous cultural heritage.

Example: The Commonwealth Scientific and Industrial Research Organisation (Australia): *Our Knowledge: Our Way*³⁶²

The Commonwealth Scientific and Industrial Research Organisation is the Australian Government Agency responsible scientific research. In 2020, they published the *Our Knowledge: Our Way* Guidelines are best practice guidelines for Indigenous-led approaches to strengthening and sharing Indigenous knowledge for land and sea management. They show several ways that Indigenous Peoples across Australia are maintaining their connection to Country through land and sea management techniques. This also includes protection and promotion of GR, TK and TCE.

The Guidelines contain numerous case studies contributed by Indigenous Peoples and their partners as best practice examples for engaging with TK in land and sea management. They reveal the unique connection between Indigenous Peoples and their Country, that ensures the ongoing transmission of knowledge between generations.

Example: Australian Museum and Galleries Association: *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*

The Australian Museum and Galleries Association *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries* (The Roadmap), as discussed above, can be likened to guiding Protocols for Australian museum and gallery sector. Whilst focusing on several key areas, it is underpinned with Indigenous self-determination and reconciliation. The 5 Key Element for Change within The Roadmap that:

- Reimagining Representation

³⁶² Woodward, E., Hill, R., Harkness, P. and R. Archer (Eds) 2020, '*Our Knowledge Our Way in caring for Country: Indigenous-led approaches to strengthening and sharing our knowledge for land and sea management. Best Practice Guidelines from Australian experiences*' (Guidelines, CSIRO, NAILSMA, 2020) (available at <https://www.csiro.au/en/research/indigenous-science/indigenous-knowledge/our-knowledge-our-way>).

- Embedding Indigenous Values into Museum and Gallery Business
- Increasing Indigenous Opportunity
- Two Way Care Taking of Cultural Material
- Connecting with Indigenous Communities

These 5 Key Elements tap into different parts of the sector to ensure that the relationship between museums and galleries and Indigenous peoples move away from their Eurocentric Foundations. By moving away from these foundations, which have historically placed Indigenous peoples as the 'other' towards centring Indigenous perspectives, dramatic change can be undertaken.

Within The Roadmap, there are indicators for change, these are called 'Critical Pathways'. They include updating policies, embedding Indigenous Cultural and Intellectual Property Protocols, championing Indigenous staff in leadership roles, Indigenous led and designed projects, repatriating all ancestral remains, and developing relationship agreements with Indigenous communities.³⁶³ If achieved over the 10 year period, the envisaged future is where Indigenous communities have control over their cultural materials, which is followed by trust, cultural revitalisation and stronger relationships between Indigenous Australians, and non-Indigenous Australians, ultimately, reconciliation.

Collections within Museums, Archives, Galleries or Libraries

Museums often house significant collections of cultural heritage objects obtained under varying circumstances over a country's history, much of which occurred during a process of colonisation. Whilst the circumstances in which these objects came into the possession of the museums are negative, they have a custodial responsibility to manage these collections and new materials that come under their responsibility.

Deposit forms for new materials to be housed in museum collections can be drafted to ensure that ownership and control can be managed in line with the highest ethical standards. Historical deposit forms may have retained ownership and control with the depositors, or in the case of copyright material, the copyright owners. This may restrict access and use by the Indigenous and Local Communities who are the subjects of the materials, or had the cultural heritage objects removed from their communities.

The potential for cultural harm to occur with historic collections if current ethical standards are not applied, increases the harm of cultural misappropriation.³⁶⁴ Mr Wend Wendland, Director of the Traditional Knowledge Division of WIPO, identified that the process of seeking to preserve collections, through digitisation, can trigger Indigenous peoples' "concerns about their lack of

³⁶³ Terri Janke, *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*, Australian Museums and Galleries Association, 2018 page 9

<http://docs.wixstatic.com/ugd/f76062_c67539d5b2e2433181f66b15ec499d89.pdf>.

³⁶⁴ Wend Wendland, 'Safeguarding Cultural Heritage, Protecting Intellectual Property and Respecting the Rights and Interests of Indigenous Communities: What Role for Museums, Archives and Libraries?' (Paper presented at "Can Oral History Make Objects Speak?", Nafplion, Greece, 18-21 October 2005) (available at https://icme.mini.icom.museum/wp-content/uploads/sites/16/2019/01/ICME_2005_wendland.pdf).

legal protection against misappropriation and misuse”.³⁶⁵ This concern is evident from the following case study on *Deep Forest*.

Case Study: French Music Group *Deep Forest* and their song ‘*Sweet Lullaby*’

French music group, *Deep Forest*, used recordings of a traditional song titled *Rorogwela* of the Solomon Islands. The Recording was taken in 1970 by ethnomusicologist, Hugo Zemp. The recordings, published by UNESCO under the *Solomon Islands: Tatakla and Baegu Music from Maliata* collection, were sampled by *Deep Forest* for the track. Whilst there is uncertainty surrounding who gave *Deep Forrest* the rights to use the track, there was no permission from the performer or the community for use of their traditional song. This highlights the issue that copyright does not protect oral songs and performances, and the owner of the recording actually has the rights to the recording itself. In this instance, the community and performer did not receive any monetary benefits from the use of the song by *Deep Forest*.³⁶⁶

This could have been avoided by embedding access protocols in the collection, ensuring not only copyright permission, but also community permission for use of traditional songs. This occurs whether or not the community holds copyright over the recordings. Furthermore, adequate access and benefit sharing rules applied to traditional songs could ensure that use of recordings containing TCE is done with benefits being shared with the community.

5.4. Defensive Databases, Inventories & Traditional Knowledge Registers

Defensive databases, inventories and traditional knowledge registers can be used to record and safeguard GR, TK and TCE, but also protect against misappropriation. Depending on the accessibility of the information contained within, they provide several ways to protect GR, TK and TCE.

Firstly, they can control access to recorded GR, TK and TCE in accordance with cultural protocols. This often occurs within community-controlled databases that store secret and sacred TK, with access determined by cultural protocols.

Secondly, as a defensive mechanism, they can protect against exploitation of GR, TK and TCE. For example, as patents are assessed against the prior art base, they provide a record of the GR, TK and TCE that examiners can use to determine whether a claimed patent is in fact a new invention or discovery.

Thirdly, they provide access to traditional remedies and medicinal knowledge to people and communities living away from their traditional lands. This ensures the preservation of TK that may historically have only been held in oral traditions. By recording them in an accessible database communities can remain connected with the TK that they might not otherwise have access to.

³⁶⁵ Ibid, 2.

³⁶⁶ Dionysia Tabureguci, ‘The Pacific’s Stolen Identity’. *Island Sun*, 25 September 2008, 6.

Fourthly, they limit illegitimate acquisition of IP by third parties who are not custodians of that knowledge, also known as *biopiracy*. The Indian Traditional Knowledge Digital Library, referred to earlier, demonstrates how placing widely known knowledge in an accessible database can protect that knowledge. As discussed in the Consultative Workshop in April 2021, Defensive Databases, Inventories and Traditional Knowledge Registers are part of a web of protection. There is a risk that they make GR, TK and TCE more accessible by third parties which increases the risk of misappropriation, however that can also be managed through limiting access to content and materials.

Databasing and recording knowledge in online registers must be assessed with the risk of misappropriation and ensuring the safe keeping of knowledge, this is shown in the following examples of the different types of defensive databases that are led by Government or non-Government actors.

Case Study: Viet Nam National Biodiversity Database System (NBDS)

The Viet Nam Environment Administration, Ministry of Natural Resources and Environment have developed the Viet Nam National Biodiversity Database System. The NBDS aims to be a network of existing biodiversity information in Viet Nam.³⁶⁷ It is a focus on the core data and functionality so as not to duplicate existing efforts, or be an all-encompassing system, but rather a flexible interface that is adaptable to users' needs and works with external data and applications. It seeks to comply with national and international standards. There is also a local defensive database in development for GR and TK in Lao Cai province, Viet Nam.

Case Study: Viet Nam Institute of Medicinal Materials

The National Institute of Medicinal Materials, Viet Nam, is a research institute established in 1961 by the Viet Nam Ministry of Health. The Institute of Medicinal Materials has recorded TK and collected medicinal plants and the TK of the experiences of these plants by approximately 15 ethnic communities in Viet Nam. This includes collection of over 1,296 traditional medicinal remedies which have been studied for the screening, research, and development of disease prevention products.³⁶⁸ The issues related to the exploitation of these resources and knowledge have been woven into strategies and national action plans on biodiversity.³⁶⁹

Case Study: Indonesia National Data Centre for Communal IP (forthcoming)

The Government of Indonesia have prioritised communal IP as a national priority under the National Medium Term Development Plan 2020-2024. Indonesia have committed to establishing

³⁶⁷ Japan International Cooperation Agency, 'National Biodiversity Database System launched with JICA assistances', Press Release January 27 2015

<<https://www.jica.go.jp/vietnam/english/office/topics/press150127.html>>

³⁶⁸ The Socialist Republic of Viet Ministry of Natural Resources and Environment, 'The Sixth National Report of the United Nations Convention on Biological Diversity' (Report No 6, National Report to the United Nations Convention on Biological Diversity, 2019) p 154 (available at <https://www.cbd.int/doc/nr/nr-06/vn-nr-06-en.pdf>).

³⁶⁹ Ibid 185.

a National Data Centre for communal IP as a defensive database to protect Indonesian GR, TK, and TCE from commercial exploitation.³⁷⁰ The National Data Centre will include links and references to the Indonesia Biodiversity Information Facility – LIPI, Natural Herbal Medicine Information System. This will also increase the responsibility and participation of local governments in updating communal IP in their regions.

Case Study: Mukurtu Labels / Local Context Labels

The Mukurtu Labels is an adaptable labelling system that can classify information stored on a database according to cultural protocol and identification systems. The Mukurtu Labels are managed by the Mukurtu team at the Center for Digital Scholarship and Curation at Washington State University but are also used around the world including by the Jumbunna Institution for Indigenous Education and Research at the University of Technology Sydney, in Australia. The Mukurtu platform recognises and records community traditional knowledge, including GR, TK and TCE. The digital platform can be used separately to the labels, as the labels can be licenced through Creative Commons, or from Mukurtu's own licencing.

The Mukurtu website enables Indigenous communities to review the collections of participating organisations, and apply the labels according to their own cultural protocols. It also allows databases to apply the labels to their own collections. This is highly beneficial if those databases that may hold significant historical collections of materials, or are using materials provided from other databases. Labels that can be applied include men's/women's business, secret/sacred materials, non-commercialisation, attribution of ownership, and if the knowledge is from multiple communities. This facilitates the revitalisation and protection of TK and TCE through the strengthening of databases and keeping places of communal owned GR, TK and TCE, by increasing the accessibility of knowledge, and allowing communities to control or have control over access to their GR, TK and TCE.

5.5. Supply Models

Supply models can protect genetic resources found in a locality through controlling the access and availability of that resource for market consumption. Supply models that are community led often involve deep connection with the traditional knowledge of that community. For example, the Northern Australia Aboriginal Kakadu Plum Alliance (**NAAKPA**) and Potato Park Models. Both models are community-led and both involve input from several Indigenous communities on whose lands the resources are grown and harvested according to ceremonial and traditional knowledge associated with seasons and harvest. This results in a culturally and environmentally sustainable approach to the protection of biological and genetic resources, and traditional knowledge.

³⁷⁰ Dede Mia Yusanti, 'Information Systems and Due Diligence Mechanisms Relating to GR and Associated TK' (Speech delivered at WIPO Roundtable Seminar on IP and GR, Indonesia, 21 January 2021) (available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_ge_21/wipo_ipk_ge_21_presentation_8_yusanti.pdf)

Case Study: Northern Australian Aboriginal Kakadu Plum Alliance (NAAKPA)

The Northern Australia Aboriginal Kakadu Plum Alliance is an alliance of Aboriginal enterprises that the supply chain of Kakadu Plum fruit and extracts for the Australian Market. NAAKPA was established in 2018 to support Aboriginal control and leadership in the Kakadu Plum Industry. It is an alliance of 9 Aboriginal-owned enterprises that ethically harvest and process fruit across Northern Australia to supply the market. Their key objectives include:

- Become industry leaders in the research, harvest, processing and marketing of Kakadu Plum by empowering Aboriginal enterprises and families across northern Australia to draw on land assets and intellectual property (Traditional Ecological Knowledge) within their communities;
- Support community harvesting and processing enterprises and linking these directly to large scale markets and consumers by establishing an Aboriginal controlled supply and value chain Alliance;
- Provide advocacy for Alliance members: promote the products produced by Alliance members to create commercial advantage and opportunities;
- Consolidate the supply chain and make it easier for business to access the products;
- Continuing cultural practices;
- Establish best practice models/protocols in managing access to country and enable an economy that considers cultural protocols and legal obligations;
- Establish a framework to protect and access biocultural knowledge and intellectual property in the bush plant resources space on behalf of Alliance members.

A key challenge facing NAAKPA is that they are an alliance, and not a single incorporated legal entity. As a result, engaging through different legal structures brings diverse challenges and barriers. However, the shared interest in the protection of the Kakadu Plum through the objective of self-determination is integral to their success, and demonstrates that a supply model can be achieved through a shared goal.

Impact of Supply Models on the Promotion and Protection of GR, TK and TCE

Supply models that are community led, can operate absent any comprehensive rights-based approach to the protection of GR, TK and TCE. They strengthen and reaffirm communal sovereignty and decision making over natural resources and traditional knowledge through customary law and localised control. This can result in positive legal ramifications, such as through their recognition by Governments as rights management and competent decision-making entities. Developing sustainable supply models coincides with creating the infrastructure to administer and manage rights and access to GR, TK and TCE held by Indigenous and Local Communities. This can influence the negotiations on access and management of GR, TK and TCE, provide watchdog services for misappropriation, and establish competent authorities to speak on behalf of communities to promote their rights and interests. The following table demonstrates how supply models that include local databases, consumer education, and GIs or trade marks for their products can provide robust protection for GR, TK and TCE:

Table 4: Features of supply models and their protection of GR, TK and TCE

Features of Effective Supply Models	Protection of GR	Protection of TK	Protection of TCE
Community seed bank with information on genetic characteristics and medicinal use of plants, and potatoes	✓	✓	✓
Biocultural Heritage Register of TK for community use and defensive database against biopiracy	✓	✓	✓
Control of Supply Chain	✓	✓	✗
Consumer Education and positive branding	✓	✓	✓

5.6. Customary Law and Cultural Authority

Customary law refers to the norms, protocols and practices of ethnic or Indigenous communities. They are developed over time to regulate human behaviour and actions. They connect people with place, practices and each other through a kinship network. Cultural authorities are the authority structures within a community that enforce customary law.

Case Study: Customary law in Viet Nam

There are examples where cultural practices have been maintained and developed by state authorities. For example, Ede ethnic customs in the Central Highlands have 236 regulations that define responsibilities and obligations of individuals, and their role within the community. The impact of these emphasises equality and minimises discrimination amongst classes and members in the village.³⁷¹ This plays an important role during folk festivals that attract foreign researchers and investors to the TK and cultural practices inherent in forest management and protection.³⁷² The impact of these projects by foreign investors is not yet studied, however the recognition of customary law and individual and communal responsibilities is significant to embedding cultural protocols on the use of TK and TCE into state legal structures.

³⁷¹ The Socialist Republic of Viet Ministry of Natural Resources and Environment, 'The Sixth National Report of the United Nations Convention on Biological Diversity' (Report No 6, National Report to the United Nations Convention on Biological Diversity, 2019) 154 (available at <https://www.cbd.int/doc/nr/nr-06/vn-nr-06-en.pdf>).

³⁷² Ibid.

Case Study: Community Partnerships – Capacity building for the ratification and implementation of the Nagoya Protocol on Access and Benefit sharing in Viet Nam

In November 2017, the Department of Natural Resources and Environment of Lao Cai Province in Viet Nam, in collaboration with the ABS Project Management Unit, organised a consultation workshop under the title “Capacity building for the ratification and implementation of the Nagoya Protocol on Access and Benefit sharing in Viet Nam”. This workshop was held in the Lao Cai province, for the Ta Phin Commune. The Ta Phin Commune, specifically the Red Dao ethnic group, have a long history of negotiating access and use to GR and TK and implementing ABS agreements. Within this specific project, there were four components of the project, with component 4 titled “Demonstrating Public-Private Community Partnerships on Access and Benefit Sharing”.

Throughout the research and coordination stages of this component, 3 products were piloted; Relaxation spa, Sauna and Foot massage products.³⁷³ The materials used in these products are made from the TK of the properties of plants, leaves, tubers and fruits of the Red Dao Community. The research organisations who will implement the projects are selected through a competitive tender process, and enter into cooperation agreements with the Provincial People’s Committee of Lao Cai.³⁷⁴ Projects such as these result in the return of benefit to communities in exchange for access to, and use of, GR and associated TK.

Furthermore, during the implementation of the Strategic Plan for Biodiversity in the period of 2011-2020, Viet Nam shifted to focus on community-based conservation management, sustainable use of biodiversity resources, and ecotourism as ideal models for localised economies and decision making for protected areas and biosphere reserves. The models assist in the preservation and promotion of Indigenous knowledge, traditional cultural activities and through the sustainable use of land and biodiversity benefits, as supported by local governments.³⁷⁵

Case Study: New Zealand Māori TM and Patent Advisory Committee Guidelines

The Māori Trade Mark Advisory Committee and Māori Patent Advisory Committee (**Māori Advisory Committees**) are formalised advisory bodies in the New Zealand Intellectual Property Office for the Commissioner of Trade Marks and Commissioner of Patents created under the Waitangi Treaty in 2002. Alongside their advisory role, they provide public education and awareness through the publication of guidance materials for the identification of Māori imagery, and information on potential offensiveness of proposed trade marks that may contain Māori features, or patents containing Māori GR, TK, or TCE. Resources created by the Māori Advisory Committees include the *Protecting intellectual property with a Māori cultural element User Guide*

³⁷³ Ba Zin, *Workshop held to collect comments on the ABS project implementation plan at Lao Cai province pilot site* (4 May 2018) <<https://vietnamabs.gov.vn/en/workshop-held-to-collect-comments-on-the-abs-project-implementation-plan-at-lao-cai-province-pilot-site/>>.

³⁷⁴ Ibid.

³⁷⁵ The Socialist Republic of Viet Ministry of Natural Resources and Environment, ‘The Sixth National Report of the United Nations Convention on Biological Diversity’ (Report No 6, National Report to the United Nations Convention on Biological Diversity, 2019) 191-192 (available at <https://www.cbd.int/doc/nr/nr-06/vn-nr-06-en.pdf>).

for intellectual property that contains an element of Māori culture, for example, a Māori word, image, or design.³⁷⁶

5.7. Negotiating rights under Private Agreements

Contracts, while legal documents, can fall under non-legal options in the sense of being a non-legislative response. Contracts are agreements between individuals. They can adapt to customary law and ensure protocols are followed to protect GR, TK and TCE. Whilst private agreements can be one sided and result in unfair balances of power, they can also include protocols and strong protections for GR, TK, and TCE. Countries can provide guidance materials for negotiating these rights, as demonstrated in Section 5.9 with the *Guidance Document for the Implementation of Decree No. 59/2017/ Nd-Cp on the Management of Access to Genetic Resources and the Sharing of Benefits Arising from their Utilization*.

Case Study: Dior collaborating with Bali to promote Endek fabrics

In the Consultative Workshop a delegate from Indonesia referred us to the recent Statement of Intent (due to be followed by a Memorandum of Understanding) between the Bali Provincial Government and French fashion house, Dior.³⁷⁷ From our research, it seems that this case study is an example of best practice collaboration.

The subject matter of the collaboration is Endek fabrics. Endek fabrics are a traditional handwoven cloth found in various districts of Bali including Karangasem, Klungkung, Gianyar, Buleleng, Jembrana and Denpasar City. Endek weaving has been passed down for many generations. It has existed since the 18th century and has gone through many changes and developments since that time, with a particular increase in the practice following Indonesia's independence. However, the practice has dwindled in recent decades, and there are now just a few producers.³⁷⁸

The Bali Provincial Government, and Dior have agreed to work together to promote expressions of Indonesian TCE (particularly the Endek fabric) while empowering Balinese producers of the fabric. Endek fabrics were featured in Dior's collection at their Spring/Summer 2021 collection, in September 2020.³⁷⁹ It is anticipated that this was the beginning of further creative collaboration. It was reported that terms of the agreement specify that Dior must only use Endek fabrics that have been hand produced by Balinese artisans.³⁸⁰ There was also some speculation that the fabrics would have some form of GI recognition, although the details of this are unknown.³⁸¹

³⁷⁶ New Zealand Intellectual Property Office, *Protecting intellectual property with Māori cultural element*, User Guide (available at <https://www.iponz.govt.nz/assets/pdf/maori-ip/protecting-ip-with-a-maori-cultural-element.pdf>).

³⁷⁷ Erik Mangajaya, Acting Deputy Director of Law and Economic Affairs at Ministry of Foreign Affairs, Indonesia, Consultative Workshop on Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (GRTKTCE) Policy Considerations, Workshop 1, 29-30 April 2020).

³⁷⁸ Brian Sjarief, *Bali Government Collaborates with Christian Dior to Promote Balinese Woven Endek Fabric* (21 January 2021) Now!Bali <<https://www.nowbali.co.id/bali-endek-fabric-christian-dior/>>.

³⁷⁹ Ibid.

³⁸⁰ Coconuts Bali, *Bali Government Grants Dior Permission to use Kain Endek for its Collection*, (11 January 2021) <<https://coconuts.co/bali/lifestyle/bali-govt-grants-dior-permission-to-use-kain-endek-for-its-collection/>>.

³⁸¹ Ibid.

5.8. Rights Management & Decision-Making Authorities

Rights management and decision-making authorities are organisations that advocate and make decisions on behalf of their members. They play an important role in that many artists and those at risk of having their works misappropriated may not have the funds or capacity to negotiate licences, write submissions to government, or launch education and consumer campaigns to inform the public.

Copyright Agency

The Copyright Agency is an Australian not-for-profit organisation that manages statutory copyright licences, provides advocacy and education initiatives on behalf of their membership, and collects royalties for the resale of art. The Copyright Agency which administers rights for its writer and visual arts members has developed significant educational resources about indigenous arts. The Copyright Agency, working with the Arts Law Centre of Australia and the Indigenous Art Code, established the Fake Art Harms campaign aimed at stopping the cheap fake Aboriginal art rip-offs that take opportunities away from Indigenous artists.

As a rights management and decision-making authority, the Copyright Agency is able to provide services to its members to ensure the ethical negotiation and royalties for the use of artworks that may contain TK and TCE. This reduces the likelihood of misappropriation or inequitable contracts that do not compensate artists for the use of their art. Furthermore, as a rights management and decision-making authority, they have the standing to advocate for greater recognition of Indigenous artists rights, this includes employing an Indigenous engagement officer.

Australasian Performing Rights Association and Australasian Mechanical Copyright Owners Society (APRA AMCOS)

APRA AMCOS is an alliance of copyright management organisations representing songwriters, composers and music publishers. APRA AMCOS collects licence fees on behalf of their membership. APRA AMCOS also play an important advocacy role on behalf of musicians' rights locally, nationally and internationally. Artists assign their performing and communication rights to APRA AMCOS, and in some cases, their reproduction right. This enables APRA AMCOS to be the intermediary between the user and creator.

5.9. Policy and Government Response

This section will examine different policy and government responses by ASEAN members, and how they are part of the long-term strategies for greater protection of GR, TK and TCE.

Case Study: Capacity Building: IP Australia Indigenous Knowledge Project³⁸²

IP Australia is undertaking the Indigenous Knowledge Project to upskill staff, commission research, and increase their capacity to engage with GR, TK, and TCE. This project includes

³⁸² IP Australia, 'Indigenous knowledge Project', <<https://www.ipaustralia.gov.au/understanding-ip/getting-started-ip/indigenous-knowledge/indigenous-knowledge-project>>.

commissioning research and issues papers and undertaking consultation on issues regarding the misappropriation of GR, TK and TCE. IP Australia now has dedicated Indigenous expert trade mark examiners and asks applicants who seek to trade mark Indigenous words for the origin and translation of the words. Other policy initiatives include looking at options available for Indigenous Knowledge and the IP System, for this IP Australia have been undertaking consultations as part of the Indigenous Knowledge Work Plan 2020-2021 and conducting a scoping study on stand-alone / *sui generis* legislation. More information is available [here](#).

Case Study: Indonesia's Strategy for the Advancement of Culture

In Indonesia, the advancement and protection of culture, including TK and TCE, is guided by the Strategy for the Advancement of Culture. A 20-year vision for the Indonesia Nation State based on the principles of sovereign politics, independent economies, and personality in culture. At a local level, this includes the implementation of local potential-based cultural platforms: National Culture Week, Regional Culture Week, Spice Route, Indonesian, and Culture Advancement Village to promote TK and TCE.

Protection of Communal IP

In Yogyakarta, the Ministry of Law and Human Rights have signed a Memorandum of Understanding with the Provincial Government of the Special Region of Yogyakarta. This Memorandum of Understanding covers protection, development, utilisation and coaching of communal intellectual property and aims to protect and to promote communal IP including GR, TK, and TCE.³⁸³ The Communal Intellectual Property and Memorandum of Understanding is the government's way to protect the diversity of Indonesia's cultural and biological resources, strengthen communal IP ownership and prevent foreign parties from pirating or stealing Indonesian communal IP. Following the signing of this MoU, several letters were filed for the protection of Indonesian TCE. The aim of the MoU is to increase the awareness of the need to protect communal IP and increase uptake of the Directorate General of Intellectual Property's Communal IP National Database.³⁸⁴

Indonesian Cultural Congress (KKI)

The KKI is a meeting of cultural policy makers from central and regional government levels. KKI 2018 "formulates a cultural strategy prepared by each provincial government to the national level to organize and manage Indonesian culture".³⁸⁵ The 2018 KKI involved 400 participants from a range of communities across the population, including cultural communities, historians, disability groups, academics, artists etc.

³⁸³ *Ministry of Law and Human Rights Together with Provincial Government of Yogyakarta to Protect Communal Intellectual Property*, Directorate General of Intellectual Property <<https://en.dgip.go.id/portal-en/html/liputan-seluruhnya?start=45>>.

³⁸⁴ *Ministry of Law and Human Rights Together with Provincial Government of Yogyakarta to Protect Communal Intellectual Property*, Directorate General of Intellectual Property <<https://en.dgip.go.id/portal-en/html/liputan-seluruhnya?start=45>>.

³⁸⁵ Jendela, *2018 Indonesian Cultural Congress Formulates Strategy for Governance and Governance of Indonesian Culture* (June 2021) <<https://jendela.kemdikbud.go.id/v2/kebudayaan/detail/kongres-kebudayaan-indonesia-2018-rumuskan-strategi-untuk-tata-dan-kelola-kebudayaan-indonesia>>.

At a local and regional level, the KKI collected data to assist in designing and informing the national strategy. The data collected by local government is a form of strengthening cultural governance surrounding “10 objects of cultural promotion” that are identified as important for protecting Indonesia cultural identity. These include “oral traditions, manuscripts, customs, rites, traditional knowledge, traditional technology, arts, languages, folk games, and traditional sports.”³⁸⁶

The impact of the KKI is in preserving and safeguarding objects of cultural promotion, and ensuring they remain on the agenda for Indonesian national cultural strategies. In Indonesia, advancing culture is seen as an important component of an independent, sovereign, just and prosperous Indonesia. The Mission as stated in the preamble to the 1945 Constitution is to protect the entire Indonesian nation, promote public welfare, educate the nation's life, and maintain lasting peace.³⁸⁷ Currently, protecting the nation from global cultural flows, or the impacts of globalisation on unique cultural identities, through culture promotion and cultural resilience has an important position in fulfilling the Mission of the Indonesian State.

Viet Nam – Guidance Document for the Implementation of Decree No. 59/2017/ Nd-Cp on the Management of Access to Genetic Resources and the Sharing of Benefits Arising from their Utilization

The Nature and Biodiversity Conservation Agency, of the Viet Nam Environment Administration, has developed a Guide for managing access to genetic resources and sharing benefits from utilization.³⁸⁸ Released in February 2020, the guide was developed with experts as part of the Project “Capacity Building for the Ratification and Implementation of the Nagoya Protocol on Access to genetic resources and Benefit sharing in Viet Nam” The Guide aims to improve efficiency and gives clarity for entities wishing to utilise the GR of Viet Nam whilst putting potential collaborators on notice of the requirements of ABS laws.

5.10. Practical capacity building tools

Draft articles & template agreements

- WIPO draft articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources, available here https://www.wipo.int/tk/en/igc/draft_provisions.html
- Standard Agreements, Consent Forms, Licenses and Undertakings – available here https://www.wipo.int/tk/en/databases/creative_heritage/agreements/
- Model Access and Benefit Sharing Agreement between Access Provider and Access Party, proposed by the Australian Government - available here <https://www.wipo.int/tk/en/databases/contracts/texts/australiamodel.html>

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Pham Anh Cuong et al, ‘Guidance Document for the Implementation of Decree No. 59/2017/ Nd-Cp on the Management of Access to Genetic Resources and the Sharing of Benefits Arising from their Utilization’ (Guidance, Vietnam Nature and Biodiversity Conservation Agency, Feb 2020) p 7 (available at https://vietnamabs.gov.vn/wp-content/uploads/2019/06/GUIDANCE-DOCUMENT_ABS_English.pdf).

Guidelines

- IP Guidelines for access and equitable benefit sharing in relation to GRs available here https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1052.pdf
- Documenting Traditional Knowledge – A Toolkit – available here https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf
- Australian Commonwealth Scientific and Industrial Research Organisation (CSIRO) *Our Knowledge, Our Way Guidelines* <https://www.csiro.au/en/research/indigenous-science/indigenous-knowledge/our-knowledge-our-way>

Research and education

- WIPO's Traditional Knowledge Background Briefs – available here <https://www.wipo.int/publications/en/series/index.jsp?id=144>
- Technical study: Key questions on patent disclosure requirements for genetic resources and traditional knowledge (second ed) – available here https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047_19.pdf
- Resources produced by the United Nations Department of Economic and Social Affairs, Indigenous Peoples – catalogue available here <https://www.un.org/development/desa/indigenouspeoples/publications/desktop-publications.html>
- Brigette Vézina *Curbing Cultural Appropriation in the Fashion Industry* <https://www.cigionline.org/publications/curbing-cultural-appropriation-fashion-industry/>
- *Intellectual property and the safeguarding of traditional cultures: legal issues and practical options for museums, libraries and archives* written for WIPO by Molly Torsen and Jane Anderson <https://tind.wipo.int/record/28634?ln=en>

Databases

- WIPO database of Traditional Knowledge, Traditional Cultural Expressions & Genetic Resource Laws, available here <https://www.wipo.int/tk/en/databases/tklaws/>
- WIPO database of codes, guides, policies, protocols and standard agreements relating to the recording, digitisation and dissemination of TCEs https://www.wipo.int/tk/en/databases/creative_heritage/
- WIPO database of contractual practices in biodiversity-related access and benefit sharing agreements in relation to GRs available here <https://www.wipo.int/tk/en/databases/contracts/>

6. Summary Recommendations and Conclusions

6.1. Summary

This section summarises the key issues related to integration of legal and non-legal methods to produce a framework for protection of GR, TK and TCE. The preceding Comparative Study discusses some of the multilateral and free trade agreements that currently exist. However, ultimately further regional and international cooperation is required, and so this section examines

some of the challenges and opportunities of regional international integration. We then summarise the current policy and legal approaches of the AANZFTA Parties.

This summary then provides context for the recommendations in Section 6.2

6.1.1. Combining legal and non-legal approaches

There is a lot of very convincing academic commentary that points out the fundamental differences between IPR laws and the lived experiences of Indigenous and Local Communities when practicing their culture. There is also much academic commentary outlining the inevitability of GR, TK and TCE being impacted by IPR laws. Nevertheless, there are many examples of successful protection of GR, TK and TCE through IPR laws.

This brings us to the question: are standalone *sui generis* laws better than *sui generis* amendments to IPR? No. In fact, both measures are probably necessary. Equally necessary are the soft law and policy approaches discussed in Section 5.

Protection of GR, TK and TCE should be based on a combination of appropriate legal and non-legal approaches including:

- *Sui generis* laws/amendments
- Use of existing IP mechanisms
- Customary law
- Use of contractual arrangements
- Registers of traditional knowledge
- Guidelines and codes of practice.

As you will see, these are reflected in our recommendations in Section 6.2.

6.1.2. Integrating local, national and international approaches

These measures can be implemented at the national and local level. In fact, embedding them in both levels of governance will probably help to enforce their effectiveness. For example, protocols, guidelines and private agreements can be used at the local level. This is an advantage because it is very likely that the specific needs of communities will vary. Working on a local level will mean that protocols can be tailored to the specific needs of the community. Local strategies can draw on national law and policy. Likewise, national approaches can direct localised approaches without being overly prescriptive.

There is further scope for standard setting in the international theatre through trade agreements, treaties, customary international law, and model frameworks.

This integrated approach is necessary given that misappropriation of GR, TK and TCE is frequently an international issue that requires international and regional co-operation (see for example Max Mara's unauthorized reproduction of the Oma peoples' designs provided on p32). Without regional and international cooperation, it is difficult to enforce any protections established within a country.

However, it should also be noted that international measures are challenged by the fact that enforcement ultimately requires domestic ratification. For example, countries may be signatories to treaties that *agree* to implement compulsory disclosure of sources by patent applicants, but until the patent law is amended, that agreement remains unenforceable on a domestic level. This means that integrating protection measures internationally is likely to take 2 steps: regional and international agreements, followed by domestic ratification.

We have set out the opportunities and challenges of establishing national, regional and international approaches in more detail in Table 5.

Table 5: The opportunities and challenges of an integrated approach to GR, TK and TCE protections

	National	Regional	International
Opportunities	Can develop measures that respond and reflect community needs Legally enforceable solutions Can incorporate customary law	Can achieve harmonization across national systems Sets minimum standards Guides national laws Enables mutual recognition of rights between territories Potential for reciprocal enforcement Potential for regional dispute resolution	WIPO IGC style development of norms and principles Encourages detail in regional and national instruments
Challenges	Absent bilateral or multilateral agreement, protection is limited to within the particular country	National laws remain subject to respective territories	Requires harmonization of domestic laws to be effective Diverse interests to be represented Less likely to succeed without national and regional systems in place, whether sui generis, IPR or other

6.1.3. Summary of AANZFTA's current protection mechanisms

Throughout this Report we have referred to the measures implemented by the AANZFTA parties to protect GR, TK and TCE within their jurisdictions. In this section, we will consolidate the results of the GRTKTCE Survey and our resources to give an overview of the current state of play in each country. For ease of reading we have created comparative tables.

Laws for the protection of TK

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Australia	Aboriginal Heritage Act (2006)	TK (intangible)	Registered Indigenous Parties	Environmental management	Monetary Fines ³⁸⁹
Brunei Darussalam	None	n/a	n/a	n/a	n/a
Cambodia	None	n/a	n/a	n/a	n/a
Indonesia	Law No.5 of 2017 concerning the Advancement of Culture	TK & TCE	State	White Papers, Strategy, Master plans (Policy)	Administrative sanctions
	Patent Act No. 13 of 2016	TK & GR	n/a	Disclosure of origin	n/s
Lao PDR	Bio Technology Safety Law 2013	TK & GR	Indigenous peoples	Prior approval and ABS	n/a
	National Heritage (Amended) No 44/NA, dated 24 December 2014	TK, intangible cultural heritage	Registered rights holders, the State	Economic and Civil Remedies	n/a
Malaysia	Protection of New Plant Varieties Act No 634 of 2004	TK related to plant varieties	Indigenous people and local communities ³⁹⁰	Prior written consent required in application. ³⁹¹	n/a

³⁸⁹ *Aboriginal Heritage Act (2006) (Vic) s 110(6).*

³⁹⁰ *Protection of New Plant Varieties Act 2004 (Malaysia) No 634, art 2.*

³⁹¹ An application for registration of a new plant variety or grant of plant breeders rights must be accompanied with prior written consent of the authority representing the local community of Indigenous people where the plant variety is developed from traditional varieties and be supported by documents relating to the compliance of any law regulating access to genetic or biological resources; *Protection of New Plant Varieties Act 2004 (Malaysia) No 634, art 12.* Additionally, a new plant variety can only be registered if new, distinct, uniform and stable. If a plant variety is bred, or discovered, or developed by a farmer, local community of Indigenous people, the plant may still be registered as new, distinct, and identifiable; *Protection of New Plant Varieties Act 2004 (Malaysia) No 634, art 14.*

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
	Access to Biological Resources and Benefit Sharing Act 2017	TK & GR	Indigenous and Local Communities, State	Informed Consent and ABS	
Myanmar	Patent Law of Myanmar (2019)	TK & GR	Indigenous Peoples and Local Communities	Prior consent, disclosure of origin. ³⁹²	"may direct to transfer the proprietary interests of the patent to the relevant organization and shall withdraw the application or abandon the patent, if that, generates strong public concern or raises issues of morality and public order"
	Traditional Drug Law	TK	Rights (Licence) holders, incl. Indigenous medical practitioners ³⁹³	Economic rights	
New Zealand	Patents Act 2013	TK	Māori	Commissioner to seek advice from Māori advisory committee ³⁹⁴	Non-registration ³⁹⁵
	Trade Marks Act 2002	TK & TCE	Māori	Commissioner cannot register a mark that would offend Māori ³⁹⁶	Non-registration ³⁹⁷

³⁹² *Patent Law of Myanmar* (2019), Art 20(b)(7), Art 22(c)

³⁹³ *Indigenous Myanmar Medical Practitioners Board Rules* 1995, s 7.

³⁹⁴ *Patents Act 2013* (New Zealand), s14(3).

³⁹⁵ *Patents Act 2013* (New Zealand), s14(1).

³⁹⁶ *Trade Marks Act 2002* (New Zealand) s 17(1)(c).

³⁹⁷ *Trade Marks Act 2002* (New Zealand) s 17(1)(c).

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Philippines	Indigenous Peoples Rights Act of 1997 (Republic Act No 8371)	TK	Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs). ³⁹⁸	Cultural rights recognized, ³⁹⁹ right to own and control IPR rights, ⁴⁰⁰ free, prior informed consent rights when accessing biological and genetic resources. ⁴⁰¹	n/a
	1987 Philippine Constitution ⁴⁰²	TK, GR	Indigenous Peoples	Constitutional Right	Constitutional Challenge
	Traditional and Alternative Medicine Act of 1997	TK & GR	Rights Holders	Registration of Traditional Medicine for Filipinos	n/a
	Republic Act No 10066 or the National Cultural Heritage Act of 2009	TK	Indigenous Peoples	Registration	Cease and Desist, Compulsory repair orders, fines, imprisonment.
	Implementing Rules and Regulations of Republic Act 10055 (Joint Administrative Order No 02-2010)	TK and GR	Holders of traditional and Indigenous Knowledge	Rules for disclosure of source ⁴⁰³	n/a

³⁹⁸ *Indigenous Peoples Rights Act of 1997* (Republic Act No 8371) s 3(h).

³⁹⁹ ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs; *Indigenous Peoples Rights Act of 1997* (Republic Act No 8371) s 32.

⁴⁰⁰ ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual property rights; *Indigenous Peoples Rights Act of 1997* (Republic Act No 8371) s 34.

⁴⁰¹ Access to biological and genetic resources and to Indigenous knowledge related to the conservation, utilization and enhancement of these resources shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community; *Indigenous Peoples Rights Act of 1997* (Republic Act No 8371) s 35.

⁴⁰² 1987 Philippine Constitution, Art CIII, s 7; Art XIV, s 17.

⁴⁰³ Where disclosure is triggered relating to potential IP rights and/or biodiversity and genetic resource, traditional knowledge and Indigenous knowledge systems, there are detailed rules around disclosure by research and development institutions that include identification of TK and Indigenous knowledge in the IPR application, and primary source (or secondary if primary is not available). This is necessary whenever the subject matter of the IPR application is directly based on any biodiversity, genetic resources or materials, traditional knowledge, and Indigenous knowledge, systems and practices to which the research and development institution had access prior to filing the IPR application. Implementing Rules and Regulations of Republic Act 10055 (Joint Administrative Order No 02-2010) rule 12 (c) (i)-(i).

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Thailand	Protection and Promotion of Traditional Thai Medicinal Intelligence Act B.E. 2542 (1999)	Medicine, texts, drugs. ⁴⁰⁴	Registered rights holders. ⁴⁰⁵	Personal formulas can be registered. ⁴⁰⁶	n/a
	Traditional Thai Medicinal Intelligence Act B.E 2542 (1999)	TK & TCE	Registered rights holders	IP Rights over national, general or personal formula's or texts, of traditional Thai drugs, documents or medicines.	
	The Promotion and Conservation of Intangible Cultural Heritage Act B.E. 2559 (2016)	TK	'Community' ⁴⁰⁷	Recommendations for protection by responsible Commission	n/a
	Biodiversity Law No 20/2008/QH12, 2009	TK & GR.	Registered rights holders. ⁴⁰⁸	Access and benefit sharing contracts. ⁴⁰⁹	
Viet Nam	Circular No. 01/2007/Tt-Bkhcn Of February 14, 2007, Guiding The Implementation Of The Government's	GR, TK and TCE	Indigenous Peoples, State	Patent Disclosure, for TK associated with GR, Disclosure of origin,	

⁴⁰⁴ *Traditional Thai medicine, texts on traditional Thai medicine and Thai traditional drugs: Protection and Promotion of Traditional Thai Medicinal Intelligence Act (1999) (Thailand) B.E. 2542, s 3.*

⁴⁰⁵ Those who have registered their IP rights on traditional medical intelligence; *Protection and Promotion of Traditional Thai Medicinal Intelligence Act (1999) B.E. 2542, s 3*; Those eligible for to register rights include: Inventors of the formula; Improvers or developers of the formula; or Inheritors of the formula; *Protection and Promotion of Traditional Thai Medicinal Intelligence Act (1999) (Thailand) B.E. 2542, s 21.*

⁴⁰⁶ There are three types of traditional Thai medicinal intellectual property rights: national formula or text, general formula or text, and personal formula or text: *Protection and Promotion of Traditional Thai Medicinal Intelligence Act (1999) (Thailand) B.E. 2542, s16*; A personal formula of traditional Thai drugs or personal text on traditional Thai medicine may be registered for protection of intellectual property rights: *Protection and Promotion of Traditional Thai Medicinal Intelligence Act (1999) (Thailand) B.E. 2542, s 20.*

⁴⁰⁷ *The Promotion and Conservation of Intangible Cultural Heritage Act B.E 2559 (2016) Thailand, s 18.*

⁴⁰⁸ The state encourages individuals to register traditional knowledge copyrights on genetic resources: *Biodiversity Law 2009 (Vietnam) No 20/2008/QH12 art 64(1).*

⁴⁰⁹ After rights have been registered, organisations or individuals wishing to access GR shall enter into contracts with organisations, households or individuals assigned to manage the genetic resource: *Biodiversity Law 2009 (Vietnam) No 20/2008/QH12 art 58(1)*; Contracts must consider sharing of benefits with the State and related parties, including the distribution of intellectual property rights over invention results on the basis of access to genetic resources and traditional knowledge copyrights on genetic resources: *Biodiversity Law 2009 (Vietnam) No 20/2008/QH12 art 58 (3)(i).*

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
	Decree No. 103/2006/Nd-Cp Of September 22, 2006, Detailing and Guiding The Implementation Of A Number Of Articles Of The Law On Intellectual Property Regarding Industrial Property ⁴¹⁰				
	Decree No. 59/2017/NĐ-CP dated 12 May 2017 on management of access to genetic resources and benefit sharing from the use of genetic resources	GR		Patent disclosure for GR ⁴¹¹	

⁴¹⁰ Clause 23.11; Article 64;

⁴¹¹ *Decree No. 59/2017/NĐ-CP dated 12 May 2017 on management of access to genetic resources and benefit sharing from the use of genetic resources* (Viet Nam) clause 2, article 22.

Laws for the protection of TCE

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Australia	Copyright Act 1968	TCE (published)	Author, Performer	Economic and moral rights.	n/a
	Protection of Movable Cultural Heritage Act 1986	Movable cultural heritage	Owners of movable cultural heritage	Regulation of import and export of cultural heritage including heritage of Aboriginal and Torres Strait Islander peoples	Fines and offences
Brunei Darussalam	Emergency (Copyright) Order 1999	Published and Unpublished works. ⁴¹²	Rights managed by the right holder or the state. ⁴¹³	Economic and moral rights. ⁴¹⁴	Copyright infringement. ⁴¹⁵
Cambodia	Law on Copyright and Related Rights	Choreographic works of folklore. ⁴¹⁶	Rightsholder usually author. ⁴¹⁷	Economic and moral rights. ⁴¹⁸	Copyright infringement. ⁴¹⁹
Indonesia	Law No 19 of July 29, 2002 on Copyright	Folklores ⁴²⁰	The state. ⁴²¹	Non-citizens must seek permission from the state to use. ⁴²²	n/a

⁴¹² Where there is an unpublished work of unknown authorship, but there is evidence that the author would otherwise qualify for copyright protection by connection with a country outside Brunei, then copyright subsists in the work: *Emergency (Copyright) Order 1999* (Brunei Darussalam) s 173(1).

⁴¹³ Rights to be managed by a body appointed to protect and enforce copyright by his Majesty the Sultan and Yang Di-Peruan: *Emergency (Copyright) Order 1999* (Brunei Darussalam) s 173(2)-(3).

⁴¹⁴ *Emergency (Copyright) Order 1999* (Brunei Darussalam) s 18(1).

⁴¹⁵ *Emergency (Copyright) Order 1999* (Brunei Darussalam) s 99(1)-(2).

⁴¹⁶ *Law on Copyrights and Related Rights 2003* (Cambodia) art 7(d).

⁴¹⁷ *Law on Copyrights and Related Rights 2003* (Cambodia) art 13.

⁴¹⁸ *Law on Copyrights and Related Rights 2003* (Cambodia) art 18.

⁴¹⁹ *Law on Copyright and Related Rights* art 57 & 58.

⁴²⁰ Folklores and works of popular culture that are commonly owned, such as stories, legends, folk tales, epics, songs, handicrafts, choreography, dances, calligraphies, and other artistic works: *Law No 19 of July 29, 2002 on Copyright* (Indonesia) art 10(2).

⁴²¹ *Law No 19 of July 29, 2002 on Copyright* (Indonesia) art 10(2).

⁴²² To publish or reproduce the works by anyone who is not a citizen of Indonesia shall, firstly, seek permission from the institution related to the matter: *Law No 19 of July 29, 2002 on Copyright* (Indonesia) art 10(2).

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
	Law Number 5 of 2017 concerning the Advancement of Culture	TK, rites, traditional technology, arts and language are all considered Objects of Advancement of Culture. ⁴²³	Stakeholders in TCE	Under the law, the Central Government and/or Regional Government is obligated to record and document Objects of Advancement of Culture. ⁴²⁴ They further have an obligation to safeguard Objects of Advancement of Culture ⁴²⁵	
Lao PDR	Law No. 1/NA of December 25, 2017 on Intellectual Property (as amended)	Traditional literary or artistic work. ⁴²⁶	Performers ⁴²⁷	People can develop new work based on traditional work, but restrictions of trade mark registration. ⁴²⁸	
	Law on National Heritage 2013	TCE	Stakeholders of TCE	Sets out the regulations on administration of national heritage ⁴²⁹	
Malaysia	Geographic Indications (Amendment) Act 2002	TK & TCE	Rights holders	Sets out Registration of GI. Registration for 10 years, renewable on application ⁴³⁰	

⁴²³ *Law No 5 of 2017 on the Advancement of Culture 2017* (India) art 5.

⁴²⁴ *Law No 5 of 2017 on the Advancement of Culture 2017* (Indonesia) art 17.

⁴²⁵ *Law No 5 of 2017 on the Advancement of Culture 2017* (Indonesia) art 22.

⁴²⁶ *Law on Intellectual Property Law 2020* (Lao PDR) No. 1/NA of December 25, 2017 (as amended) art 105.

⁴²⁷ Performers, including actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works or expressions of folklore: *Law on Intellectual Property Law 2020* (Lao PDR) No. 1/NA of December 20, 2011 (as amended) art 91(1).

⁴²⁸ A work based on a traditional literary or artistic work shall be protected under copyright without prejudice to the rights of others to make original works based on the same traditional literary or artistic work and to continue to exploit the traditional literary and artistic works: *Law on Intellectual Property Law 2020* (Lao PDR) No. 1/NA of December 20, 2011 (as amended) art 101; However, marks that consist of or contain, without authorization, images of cultural symbols or historical monuments, or the name, image or likeness of a national hero or leader, or the mark would be offensive or contrary to the fine traditions of the nation are ineligible for trade mark registration: *Law on Intellectual Property Law 2020* (Lao PDR) No. 1/NA of December 20, 2011 (as amended) art 23(8).

⁴²⁹ *Law on National Heritage 2013* (Lao PDR) art1.

⁴³⁰ *Geographic Indications (Amendment) Act 2002* (Malaysia) s19A.

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Myanmar	Copyright Law (2019)	Collection of TCE	Rightholder	Economic Right, Moral Right	n/a
New Zealand	Copyright Act 1994	Recordings of folk songs	n/a	Can record folksongs for archives ⁴³¹	n/a
	Treaty of Waitangi/Te Tiriti o Waitangi	Taonga (treasures)	Māori	Māori version guarantees “tino rangatiratanga” (full authority or chieftainship) over all “taonga” (treasures, which to Māori includes both tangible and intangible, material and non-material) ⁴³²	
	Haka Ka Mate Attribution Act 2014	Haka Ka Mate	Ngāti Toa Rangatira	Right of attribution	
	Protected Objects Act 1975	TCE	Stakeholders in New Zealand objects (including Nga taonga tūturu)	Regulates export and import of these objects & sale, trade or ownership of taonga tūturu ⁴³³	
	Trade marks Act 2002	TK & TCE	n/a	Commissioner cannot register a mark that would offend Māori ⁴³⁴	Non-registration ⁴³⁵
Philippines	Rule 6 of the Joint IPOPHL-NCIP Administrative Order No. 01, 2016 (or the Rules and Regulations on IP Rights Application and Registration Protecting the IKSP of the Indigenous Peoples and Indigenous Cultural Communities)	TCE	Knowledge holders of indigenous knowledge systems and practices	Compulsory disclosure when registering IP rights; statement of compliance with requirement of free, prior, informed consent. Where no registration required, attribution of source required when IP is communicated to the public ⁴³⁶	n/a
Thailand	Patent Act B.E. 2522 (1979)	n/a	n/a	n/a	n/a

⁴³¹ *Copyright Act 1994* (New Zealand) s 72.

⁴³² *Treaty of Waitangi/Te Tiriti o Waitangi* (New Zealand) art 2.

⁴³³ *Protected Objects Act 1975* (New Zealand) s1A.

⁴³⁴ *Trade Marks Act 2002* (New Zealand) s 17(1)(c).

⁴³⁵ *Trade Marks Act 2002* (New Zealand) s 17(1)(c).

⁴³⁶ *Joint IPOPHL-NCIP Administrative Order No. 01, 2016 (or the Rules and Regulations on IP Rights Application and Registration Protecting the IKSP of the Indigenous Peoples and Indigenous Cultural Communities)* (the Philippines) rule 6.

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Viet Nam	Law No 50/2005/QH11 of November 29, 2005 on Intellectual Property	Folklore, and folk art works of culture. ⁴³⁷	Knowledge holders ⁴³⁸	Attribution requirement ⁴³⁹	

Laws for the protection of GR

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Australia	Environmental Protection and Biodiversity Conservation Act & Regulations	GR	Native title holders	Permit required to access biological resources in Commonwealth area; benefit-sharing agreement required where potentially commercial purpose ⁴⁴⁰	n/a
Brunei Darussalam	(1) Forests Act (Cap. 46) (2) Fisheries Order 2009 (3) Wildlife Protection Act (Cap. 102) (4) Wild Flora and Fauna Order 2007	GR (1) Forest Produce and forest reserves (as defined by the Forests Act (Cap 46) (2) Fish and marine reserves /	State	Requirements as to licenses access permits, export permits and agreements to be entered into with the State before access is given.	criminal penalties and contractual remedies

⁴³⁷ *Law on Intellectual Property 2005* (Viet Nam) No 50/2005/QH11, art 14.

⁴³⁸ Folklore and folk art works means collective creations based on traditions of a community or individuals reflecting such community's earnest expectations of which the expression is appropriate to its cultural and social characteristics, and its standards and values, which have been handed down by imitation or other modes: *Law on Intellectual Property 2005* (Viet Nam) No 50/2005/QH11, art 23(1).

⁴³⁹ *Law on Intellectual Property 2005* (Viet Nam) No 50/2005/QH11, art 23(2).

⁴⁴⁰ *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) r 8A.06-8A.07.

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
		marine parks (as defined by the Fisheries Order 2009) (3) Wild life listed in the schedule to the Wild Life Protection Act (Cap 102) (4) Endangered Species			
Cambodia	None	n/a	n/a	n/a	n/a
Indonesia	Law Number 12 of 1992 concerning Plant Cultivation Systems	Further detail not accessible	Further detail not accessible	Further detail not accessible	Further detail not accessible
	Patent Act No. 13 of 2016	TK & GR	Further detail not accessible	Further detail not accessible	Further detail not accessible
	Law Number 32 of 2009 concerning Environmental Protection and Management	TK & GR	Traditional communities	Government authorized to stipulate policies on procedures for recognizing traditional communities, local wisdom, and the rights of traditional communities with respect to environmental protection and management ⁴⁴¹	n/a

⁴⁴¹ Law Number 32 of 2009 concerning Environmental Protection and Management (Indonesia) Article 63(1)t.

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Lao PDR	Biotechnology Safety Law 2013	Further detail not accessible	Further detail not accessible	Further detail not accessible	Further detail not accessible
	Medicine and Medical Product Law 2011	GR & TK	Knowledge holders	Act regulates use of medicines and medical products which includes Traditional medicine ⁴⁴²	n/a
Malaysia	Protection of New Plant Varieties Act No 634 of 2004	TK related to plant varieties	Indigenous people and local communities ⁴⁴³	Prior written consent required in application. ⁴⁴⁴	n/a
	Access to Biological Resources and Benefit Sharing Act 2017	GR & TK	Local communities ⁴⁴⁵	Permit required to access biological resource or traditional knowledge ⁴⁴⁶ Also, clearing house mechanism that maintains confidentiality of culturally sensitive knowledge ⁴⁴⁷	
Myanmar	Patent Law of Myanmar 2019	GR & TK	TK knowledge holders	Disclosure of origin required for direct or indirect use of TK ⁴⁴⁸	"may direct to transfer the proprietary interests of the patent to the relevant organization and shall withdraw the application or abandon the patent, if that, generates strong public concern

⁴⁴² *Medicine and Medical Product Law 2011* (Lao PDR) article 1-2.

⁴⁴³ *Protection of New Plant Varieties Act No 634 of 2004* (Malaysia) art 2.

⁴⁴⁴ An application for registration of a new plant variety or grant of plant breeders rights must be accompanied with prior written consent of the authority representing the local community of Indigenous people where the plant variety is developed from traditional varieties and be supported by documents relating to the compliance of any law regulating access to genetic or biological resources; *Protection of New Plant Varieties Act No 634 of 2004* (Malaysia) art 12. Additionally, a new plant variety can only be registered if new, distinct, uniform and stable. If a plant variety is bred, or discovered, or developed by a farmer, local community of Indigenous people, the plant may still be registered as new, distinct, and identifiable; *Protection of New Plant Varieties Act No 634 of 2004* (Malaysia) art 14.

⁴⁴⁵ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s4.

⁴⁴⁶ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s12(1).

⁴⁴⁷ *Access to Biological Resources and Benefit Sharing Act 2017* (Malaysia) s33(1)-(3).

⁴⁴⁸ *Patent Law of Myanmar 2019* (Myanmar) ar t20(b)(7) & 22(c).

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
					or raises issues of morality and public order”
New Zealand	None	n/a	n/a	n/a	n/a
Philippines	Implementing Rules and Regulations of Republic Act 10055 (Joint Administrative Order No 02-2010)	TK and GR	Holders of traditional and Indigenous Knowledge	Rules for disclosure of source ⁴⁴⁹	n/a
	The Joint DENR-DA-PCSD-NCIP Administrative Order No. 1-05 provides Guidelines for Bioprospecting Activities in the Philippines.	TK & GR	Indigenous peoples	Regulates access to biological resources and traditional knowledge. Consent required from resource providers, and must have fair and equitable benefit sharing arrangements. ⁴⁵⁰	

⁴⁴⁹ Where disclosure is triggered relating to potential IP rights and/or biodiversity and genetic resource, traditional knowledge and Indigenous knowledge systems, there are detailed rules around disclosure by research and development institutions that include identification of TK and Indigenous knowledge in the IPR application, and primary source (or secondary if primary is not available). This is necessary whenever the subject matter of the IPR application is directly based on any biodiversity, genetic resources or materials, traditional knowledge, and Indigenous knowledge, systems and practices to which the research and development institution had access prior to filing the IPR application. Implementing Rules and Regulations of Republic Act 10055 (Joint Administrative Order No 02-2010) rule 12 (c) (i)-(i).

⁴⁵⁰ *Joint DENR-DA-PCSD-NCIP Administrative Order No. 1-05 provides Guidelines for Bioprospecting Activities in the Philippines*, s1.1-1.2.

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
Thailand	Protection and Promotion of Traditional Thai Medicinal Intelligence Act B.E. 2542 (1999)	Medicine, texts, drugs. ⁴⁵¹	Registered rights holders. ⁴⁵²	Personal formulas can be registered. ⁴⁵³	n/a
Viet Nam	Biodiversity Law No 20/2008/QH12, 2009	TK of GR.	Registered rights holders. ⁴⁵⁴	Access and benefit sharing contracts. ⁴⁵⁵	

⁴⁵¹ *Traditional Thai medicine, texts on traditional Thai medicine and Thai traditional drugs: Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542, s 3.

⁴⁵² Those who have registered their IP rights on traditional medical intelligence; *Traditional Thai medicine, texts on traditional Thai medicine and Thai traditional drugs: Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand), s 3; Those eligible for to register rights include: Inventors of the formula; Improvers or developers of the formula; or Inheritors of the formula; *Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542 s 21.

⁴⁵³ There are three types of traditional Thai medicinal intellectual property rights: national formula or text, general formula or text, and personal formula or text: *Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542, s 16; A personal formula of traditional Thai drugs or personal text on traditional Thai medicine may be registered for protection of intellectual property rights: *Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999* (Thailand) B.E. 2542, s 20.

⁴⁵⁴ The state encourages individuals to register traditional knowledge copyrights on genetic resources: *Biodiversity Law 2009* (Vietnam) No 20/2008/QH12 art 64(1).

⁴⁵⁵ After rights have been registered, organisations or individuals wishing to access GR shall enter into contracts with organisations, households or individuals assigned to manage the genetic resource: *Biodiversity Law 2009* (Vietnam) No 20/2008/QH12 art 58(1); Contracts must consider sharing of benefits with the State and related parties, including the distribution of intellectual property rights over invention results on the basis of access to genetic resources and traditional knowledge copyrights on genetic resources: *Biodiversity Law 2009* (Vietnam) No 20/2008/QH12 art 58 (3)(i).

Countries	Law	Subject matter for protection	Beneficiaries	Scope of protection	Consequences of non-compliance
	Decree No. 59/2017/NĐ-CP dated 12 May 2017 on management of access to genetic resources and benefit sharing from the use of genetic resources.	GR	Indigenous peoples	Patent disclosure for GR ⁴⁵⁶	Withdrawal of licence.

⁴⁵⁶ *Decree No. 59/2017/NĐ-CP dated 12 May 2017 on management of access to genetic resources and benefit sharing from the use of genetic resources (Viet Nam) clause 2, article 22.*

Non-legal protections of GR, TK and TCE

Countries	Industry protocols	Databases	Government policies	Government department for protection of cultural rights	Advisory bodies
Australia	<ul style="list-style-type: none"> The Australia Council for the Arts has published Protocols for Using First Nations Cultural and Intellectual Property in the Arts Australia Museum and Galleries Association <i>First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries</i> Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) "Code of Ethics" Fake Art Harms Culture Campaign 	There are many privately run databases not accessible by the public. This is on an ad-hoc basis.	<ul style="list-style-type: none"> IP Australia's Indigenous Knowledge Work Plan 2020-21 CSIRO Our Knowledge: Our Way 	AIATSIS is an Australian Government statutory authority.	Department of Agriculture, Water and the Environment, Indigenous Advisory Committee
Brunei Darussalam	n/a	n/a	n/a	n/a	n/a
Cambodia	n/a	n/a	n/a	n/a	n/a

Countries	Industry protocols	Databases	Government policies	Government department for protection of cultural rights	Advisory bodies
Indonesia	n/a	AI IP	<ul style="list-style-type: none"> Indonesia's Strategy for the Advancement of Culture 	<ul style="list-style-type: none"> Ministry of Education and Culture Ministry of Law and Human Rights 	
			<ul style="list-style-type: none"> Statement of Intent between Bali Provincial Government and Dior 		
Lao PDR	n/a	n/a	n/a	n/a	n/a
Malaysia	Malaysia Traditional Knowledge Digital Library ⁴⁵⁷	n/a	<ul style="list-style-type: none"> National Policy on Biological Diversity (NPBD) 2016 - 2025 National Forestry Policy National Policy on Environment National Policy on Wetlands National Biotechnology Policy Sarawak Biodiversity Centre Ordinance 1997 Sarawak Biodiversity Regulations 2004 Biodiversity Ordinance Sabah 2000 	n/a	n/a
Myanmar	n/a	n/a	n/a	<ul style="list-style-type: none"> Ministry of Religious Affairs and Culture Ministry of Natural Resources and 	n/a

⁴⁵⁷ Mohd Sukri bin Mohd Nor, Patent Examiner from Intellectual Property Corporation of Malaysia, Regional Workshop on Genetic Resources, Traditional Knowledge and Traditional Cultural Expression (GRTKTCE) Policy Considerations, 4-5 August 2021).

Countries	Industry protocols	Databases	Government policies	Government department for protection of cultural rights	Advisory bodies
				Environmental Conservation (TK	
New Zealand	n/a	n/a	Practical Guidelines: Māori Advisory Committee and Māori Trade Marks	Ministry of Māori Development – Te Puni Kōkiri	The Waitangi Tribunal
Philippines	n/a	<ul style="list-style-type: none"> Administrative order No 03012 The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012 The joint intellectual Property Office of the Philippines and National Commission on Indigenous Peoples (NCIP) Administrative Order No 1, 2016 The joint DEN-DA-PCSD-NCIP Administrative Order No 1-05 Implementing Rules and Regulations of Republic Act 10055 (Joint Administrative Order No 02-2010) NCIP Administrative Order No 01-12 The Indigenous Knowledge Systems and Practices and Customary Laws Research and 	n/a	National Commission on Indigenous Peoples	Technical Working Group on Access and Benefit Sharing (ABS) of GRTKTCE

Countries	Industry protocols	Databases	Government policies	Government department for protection of cultural rights	Advisory bodies
		Documentation Guidelines of 2012			
Thailand	n/a	<ul style="list-style-type: none"> Thai Traditional Digital Library: TTDKL Herbal Medical Product Information System: HMPIS the Department of Cultural Promotion is developing a database of cultural heritage information. Intangible cultural heritage registers: Inscription of National Intangible Cultural Heritage under the Act of Promoting and Safeguarding the Intangible Cultural Heritage B.E. 2559 (2016) 	The Ministerial Notification prescribing the National Textbook on Thai Traditional Medicine and Recipe on Thai Traditional Medical Drug B.E. 2558 (2015)	n/a	Thailand Biodiversity Facility: TH-BIF
Viet Nam	n/a	Viet Nam National Biodiversity Database System	<ul style="list-style-type: none"> Guidance Document for the Implementation of Decree No.59/2017/Nd-Cp on the Management of Access to Genetic Resources and the Sharing of Benefits Arising from their Utilization 	n/a	n/a

Countries	Industry protocols	Databases	Government policies	Government department for protection of cultural rights	Advisory bodies
			<ul style="list-style-type: none"> <li data-bbox="1003 462 1394 540">• The National Program on conservation and sustainable use of genetic resources by 2025 		

6.2. Summary of Recommendations

The following section summarises our recommendations. We have divided our recommendations into legal and non-legal approaches for ease of reading. However, it is likely that most AANZFTA Parties will be considering implementing a combination of legal and non-legal measures, possibly using a staged approach. Additionally, AANZFTA Parties are likely to be at different stages of GR, TK and TCE protection so, some of these recommendations may be more pertinent than others.

We conclude with some suggestions that could help to integrate these measures into a regional and international approach.

6.2.1. Legal Recommendations

Recommendation 1: All countries should implement compulsory disclosure of origin requirements in their patent law

Patent law amendments to require compulsory disclosure of source of material that is the subject matter of the application is essential to ensure that GR and associated TK is not misappropriated. Further consideration should be given to whether failure to disclose would invalidate a registered right.

The definition of ‘use’ must be considered further: what does it mean to use TK in an invention? Is it that the invention substantially already existed (in which case, the TK should be recognised as part of the prior art base). Or was TK used to design a methodology that then led to the innovation? Should there be exceptions for when the TK is widely known (as opposed to closely held)?

We recommend following the emerging standard for these measures as set by WIPO. WIPO IGC’s 2020 edition of *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge* will give an outline of the key issues and the draft international legal instrument prepared by Mr Ian Goss, Chair WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, will provide further guidance.

Consistency across the AANZFTA region will minimise the burden on patent applicants who want to register their patents in multiple countries. It will also make it easier for users and communities to search patent databases and identify use of TK.

Additionally, AANZFTA Parties could consider including an access and benefit sharing trigger. For example, if TK is used (as defined by the Act) perhaps applications should be required to show consent documentation, and evidence of access and benefit sharing arrangements.

Recommendation 2: All countries should have access and benefit sharing agreements

Access and benefit sharing agreements are required to ensure equitable sharing of profits when GR, TK and TCE is commercialised. A primary objective of the AANZFTA Agreement is the reduction of impediments to free trade in the area and promoting economic integration. An absence of guidance on access and benefit sharing would amount to an impediment, certainly an impediment to equitable economic integration. Protocols and guidelines can provide assistance in promoting access and benefit sharing practices, but given the trend towards exploitation of asset rich Indigenous and Local Communities and developing countries, laws would provide better protection.

Recommendation 3: Consider options for recognition of communal rights in TCEs

Conventional IP law inadequately protects communal rights in TCEs. There is significant overlap between TCEs and copyright. However, as demonstrated in the Comparative Study, copyright law frequently leaves gaps in protection. In particular, copyright law generally does not recognise communal rights in TCEs. Some countries have attempted to amend copyright law to recognise these communal interests.

AANZFTA Parties could consider whether they might amend their copyright law to recognise communal ownership of TCEs. Additionally, they could consider making an exception to the material form rule for TCEs and in doing so, better protect some TK that might otherwise fall into the public domain.

Options could include:

- Providing rights to Indigenous and Local Communities
- Establishing a government authority.

The competent authority would guard cultural integrity and attribution rights.

Moreover, communal rights still need to be balanced with the rights of individual creators. Individual creators should have individual rights over their work, even when communal responsibilities exist concurrently.

However, there are objections to relying on copyright amendments to protect TCEs. This Comparative Study, also demonstrated that there is misalignment in the underlying values of copyright law and cultural rights. Instead, it might be more appropriate for protection of TCEs to be addressed in standalone *sui generis* legislation. Any subsequent amendments to the copyright law could then be for the purpose of harmonising it with the new protections.

Recommendation 4: Countries should consider establishing an advisory board for consultation during registration of IP rights

New Zealand's model represents best practice to-date. Some version of it should be considered by all AANZFTA Parties. We note that the New Zealand Government has recently introduced the

Plant Variety Rights Bill. The bill affords the Māori Plant Varieties Committee a power to decline applications for plant variety rights in certain situations where the grant of the right would negatively impact any kaitiaki⁴⁵⁸ relationship with the relevant variety/species.⁴⁵⁹

Consideration should be given to the skills required by the advisory board members, and their terms of reference. Extensive engagement with Indigenous and Local Communities will be required as existing cultural authorities should be leveraged for any new advisory models.

If considering implementing this at law, AANZFTA Parties will need to consider how and when the Advisory Board should be empowered to request further information and evidence of consent for use of TK or TCE. Consideration must also be given to whether the advisory board will provide advice only, or will have the authority to decline applications.

Recommendation 5: Countries should consider consumer protection laws

Consumer protection laws have real potential to promote better practices in markets. This is not a comprehensive solution to GR, TK and TCE misappropriation, but it is likely to be an essential supplement to minimise inauthentic products in the market. The effectiveness of a new consumer protection law could be increased by easily accessible reporting mechanisms. Having a designated authority assigned to investigate claims of inauthentic products could have additional benefits.

Recommendation 6: Scoping study of standalone legislation

All the usual considerations will need to be taken into account including: what is the subject matter of protection? Who are the beneficiaries? What is the scope of protection? What are the exceptions? How long will the protection last? How are the rights enforced?

Furthermore, how new legislation fits into existing laws will need to be carefully considered, and there is a risk that conflicting provisions will create confusion and undermine any additional protections.

One approach might be for standalone legislation to be more limited in scope, and aimed at a precise objective, for example, the establishment of an intangible cultural heritage register. In this instance, the stand alone legislation would be specifically targeted at recognition of TK. This Recommendation 6 is linked to the more specific Recommendation 11 which proposes a scoping study for use of traditional knowledge databases. However, please note that a traditional knowledge database need not be created by law but could be created at a policy level.

⁴⁵⁸ Kaitiakitanga is defined in New Zealand's primary environmental legislation as the 'exercise of guardianship by the tangata whenua [the iwi or hapu that hold customary authority] of an area in accordance with tikanga Māori [Māori customary values] in relation to natural and physical resources; and includes the ethic of stewardship': *Resource Management Act 1991* (NZ) s2.

⁴⁵⁹ *Plant Variety Rights Bill* (NZ) s 65(3).

6.2.2. Non-legal recommendations

Recommendation 7: Development of practical guides for businesses looking to use existing certification and collective trademarks and GI regimes to improve protection of GR, TK and TCE

We recommend that the AANZFTA Parties work together to develop practical guides for business. These practical guides can advise business on how to use the trade mark system to protect their certification and collective marks. If the country has a standalone GI system, business guides will assist local communities and Indigenous businesses to utilise the laws.

Both the CPTPP and the RCEP refer to the use of GIs. Specifically they acknowledge that countries may recognise GIs either through their trade mark system, or in standalone legislation.⁴⁶⁰ The CPTPP requires that if countries have procedures to recognise GIs (either through trade mark or *sui generis* systems) then they have to accept protections for the application of GIs in their country.⁴⁶¹ The RCEP goes further requiring parties to ensure they have adequate effective means of protecting GIs (either through trade mark or *sui generis* systems).⁴⁶²

These agreements will facilitate regional cooperation for GIs. However, countries may also want further guidance on strategies that will help them use trade mark systems and GI regimes (new or existing) to protect GR, TK and TCE. Barriers to use of laws can include cost, complexity and lack of consumer and business education.

Recommendation 8: Countries should engage further with beneficiaries of GR, TK and TCE rights

This engagement is a necessary precursor to any legal or non-legal measure. Relevant discussion topics will include preferred terminology for communities, and discussion of possible definitions for GR, TK and TCE that would be culturally appropriate for diverse communities.

Engagement will also assist in the identification of protection mechanism priorities. This Comparative Study provides a number of recommendations. Countries are likely to be at different stages of protection for GR, TK and TCE, and not all of the recommendations will be implemented at once. Importantly, any consideration of a legal or non-legal measure must be co-designed with communities.

Recommendation 9: Countries must co-design any new legal or non-legal measure with beneficiaries of GR, TK and TCE rights

This recommendation builds on the previous one, that all protection mechanisms should be co-designed with the Indigenous and Local Communities who will be the ultimate beneficiaries of the

⁴⁶⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)-2018 (Signed but Pending Ratification and Entry into Force) 18.30; Regional Comprehensive Economic Partnership (RCEP) 11.29.

⁴⁶¹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)-2018 (Signed but Pending Ratification and Entry into Force) 18.31

⁴⁶² Regional Comprehensive Economic Partnership (RCEP) 11.29.

measure. Co-designing national strategy will maintain the cultural integrity of any new protection mechanism, and increase the likelihood of them being effectively utilised.

An alternative approach would be to develop a strategy within a specific sphere of influence. For example, IP Offices designing a strategy to better protect TK through their existing IP laws. IP Australia's Indigenous Knowledge Plan is an example of this.

Recommendation 10: Countries should consider developing protocols for government departments that work most frequently with GR, TK and TCE

Some government departments may work with GR, TK and TCE particularly regularly. We already referred to IP offices in the previous recommendation. However, there could be other departments, for example those with portfolios in the arts and culture. Specific protocols and guidance documents would provide practical guidance to those departments and start to establish industry standards. It may be relevant to make financial and other support contingent on compliance with protocols and codes of conduct.

Recommendation 11: Scoping study for traditional knowledge database

The ASEAN IP Rights Action Plan 2016-2025 lists development of a network of GR and TK databases for interested member states.⁴⁶³ In the GRTKTCE Survey, Thailand noted specifically the need for databases and improved information sharing in the region.⁴⁶⁴ There are demonstrable advantages for databases within countries, and those advantages can be extended when connected to a regional framework. It also seems that among the ASEAN members, there may already be parties interested in building a database framework. For this reason, we recommend a scoping study to assess what would be involved in developing a regional database network. This may include creating new databases, and gaining access to existing databases. The study should also consider access conditions and data management requirements to ensure that use of the databases protects and promotes TK without exposing it to misappropriation. A model for TK labels could be considered.

Questions of data sovereignty and use of a protocols guide should be taken into account to ensure that data is accessed and managed according to the objectives of Indigenous and Local Communities.

Recommendation 12: Consider establishing a government entity, or independent body that can promote GR, TK and TCE rights

This recommendation should be read in conjunction with Recommendation 13. Under this Recommendation we suggest considering whether it would be appropriate to establish a government entity, competent authority, or independent body to promote the GR, TK and TCE

⁴⁶³ ASEAN, 'The ASEAN Intellectual Property Rights Action Plan 2016-2025', (Action Plan, ASEAN, 01 January 2016) 19.1-19.4 (available at <http://containeronline.ca/databasecil/2016-2025-the-asean-intellectual-property-rights-action-plan-meeting-the-challenges-of-one-vision-one-identity-one-community-through-intellectual-property/>).

⁴⁶⁴Department of Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expression: Management, Protection and Use Survey (GRTKTCE Survey) 29-30 April 2021) (Thailand Survey).

rights of Indigenous and Local Communities. In fact, the principle of self-determination requires that Indigenous and Local Communities should be empowered as the leaders in any measure that impacts their community and rights. This means that, depending on the individual context of countries it may be preferable to recognise an independent body, owned and run by Indigenous or Local Community members. Any development of a new entity or body should be co-designed with the ultimate beneficiaries.

In developing this entity or body, key questions for discussion would be:

- What would be the role of the entity?
- What would be their educational and public awareness functions?
- How could the agency build capacity for individuals and communities?
- Could the entity have a rights management function? What would it be?

Recommendation 13: Further consideration of best practice engagement measures

Engagement, collaboration and consent are interlinked practices. Any legal or non-legal measure (including the establishment of an entity as referred to in Recommendation 12) requires that the parties conduct themselves in an open and transparent manner. It also requires that feedback on ideas be freely given and responded to. When government is consulting with Indigenous and Local Communities, they must be prepared to adapt their initial plans or methodologies in order to accommodate feedback. AANZFTA parties could consider developing a best practice guide for engagement and free, prior, informed consent. This is discussed further in recommendation 14.

Effective consultation requires on-going practice of free, prior informed consent. This is the standard established under UNDRIP, as well as the CBD and Nagoya Protocols. Engagement must be initiated in the earliest stages of the project, and plenty of time allowed for discussion with all relevant stakeholders. In many instances, initial engagement will lead to identification of further stakeholders who will also need to be consulted.

Disclosure of all relevant information is an essential element to free, prior, *informed* consent.

Engagement should never be approached as a “tick box” exercise. A common error in engagement processes is that they are initiated far too late in a project’s process, and the Indigenous and Local Communities are asked to approve of a project that is all but complete.

It is also important to remember that Indigenous and Local Communities will have their own cultural protocols to follow, and so engagement cannot be rushed: in many cases a stakeholder will themselves have to go and speak to their cultural authorities about a project.

6.2.3. Recommendations to facilitate regional and international implementation

Recommendation 14: Consider developing a regional protocols document or code of conduct

Regional protocols and codes of conduct will assist in the development of collaborative regional support. These have greater flexibility than regional model laws, and can be created incrementally. For example, if it is judged that there is a priority further guidance on the principles of equitable benefit sharing, the AANZFTA parties could collaborate on a guidance document. This collaboration will build relationships between the parties, and will promote buy-in. The guidance document could also be easily updated as required. This collaboration process may also develop other strategies and deliverables: business support and education, information sharing mechanisms, for example, between IP offices.

Recommendation 15: Consider regional model laws

Regional model laws are advantageous because they set up a central best practice standard for the region. It allows countries to consider implementation as they are working together to design how a model might work. It makes it a lot easier for countries to then implement the model laws in their own jurisdiction.

From global comparisons, it appears the weakest point in the regional model framework occurs when it comes time to ratify the laws within domestic law. This may in part be due to the realities of the political process and competing political concerns. Nevertheless, this Comparative Study has indicated an alignment of policy objectives. Moreover, all the AANZFTA Parties have indicated that they require further regional integration. This indicates that a regional model law is likely to be well received, and will be more likely to be picked up in countries' domestic legislation.

Recommendation 16: AANZFTA Parties to engage with beneficiaries of GR, TK and TCE rights to identify priorities for legal and non-legal measures

This Comparative Study has summarised the current legal and non-legal measures taken by the AANZFTA Parties to protect GR, TK and TCE. It has also made recommendations for the implementation of further legal and non-legal mechanisms. Collectively, these recommendations will assist countries to move towards best practice, and lay groundwork for the implementation of regional model laws and protocols.

These recommendations have also stressed the importance of co-design with beneficiaries of GR, TK and TCE rights. Accordingly, Parties should consult with beneficiaries of GR, TK and TCE rights to identify their priorities.

-end-

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