

25 Years in the Making: The WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge

Ian Goss*

“Optimism is the faith that leads to achievement.”

— Helen Keller, 1903[†]

A historical and continuing concern of developing countries, Indigenous Peoples, and Local Communities is the misappropriation and misuse of their genetic and cultural resources. In 2000, the World Intellectual Property Organization (“WIPO”) established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”) to address these concerns. Almost a quarter of a century later—on May 24, 2024—WIPO member states concluded a binding Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (“Treaty”), which capped the IGC’s longstanding efforts to establish norms for the international protection of genetic resources and associated cultural assets. Unquestionably, the conclusion of the Treaty reaffirms and further enhances a sustained, long-term effort of a broad coalition of states and various stakeholders toward the rebalancing of the global intellectual property system anchored in the 1994 World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights. Critically, the Treaty is the first WIPO agreement that explicitly acknowledges Indigenous Peoples and Local Communities.

This Article provides a first-hand account of the long and intricate pathway towards the adoption of the Treaty, illuminates and briefly analyzes the considerable challenges encountered during the negotiations that preceded its conclusion, and draws forward-looking lessons relevant to, most notably, the ongoing IGC negotiations on traditional knowledge and traditional cultural expressions. These lessons highlight the fundamental importance of, in particular, (1) a champion to lead and drive the negotiations; (2) a negotiating environment

* Chair (2016–22), World Intellectual Property Organization (“WIPO”) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”); Facilitator (2009–16), WIPO IGC; Friend of the Chair (2012–16), WIPO IGC; Lead (2009–16), Australian Delegation to the WIPO IGC; Executive Committee (2003–16), IP Australia; Colonel (Retd) (Austl.). I would like to thank Mr. Wend Wendland, Ms. Fei Jiao, Amb. Wayne McCook, Prof. Margo Bagley, Prof. Yonah Selenti, Mr. Jukka Lienes, Amb. Robert Tene, Ms. Krisztina Kovacs, Mr. Marco D’Alessandro, Mr. Martin Girsberger, Prof. Ruth Okediji, Prof. Chidi Oguamanam, Ms. Chichi Umesi, Prof. Paul Kuruk, Mr. Erry Prasetyo, Ms. Jennifer Corpuz, Ms. Sue Noe, Mr. Preston Hardison, Mr. Dominic Keibell, Mr. Tomas Felcman, Amb. James Baxter, Ms. Edwina Lewis, Ms. Tanya Duthie, Ms. Lilyclaire Bellamy, and Mr. Steven Bailie.

† HELEN KELLER, OPTIMISM 28 (1903).

and processes that facilitate a shared understanding of diverse and often incongruent policy positions; (3) a negotiating strategy that recognizes the importance of timing and builds support behind a text that appropriately balances the interests of a critical mass of member states and stakeholders; (4) an incremental approach towards negotiations on complex policy issues; and (5) a recognition that all negotiations are underpinned by personal relationships that depend on trust and respect.

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INTRODUCTION

In 2000, the General Assembly of the World Intellectual Property Organization (“WIPO”) established, at the behest of developing countries, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”).¹ The principal objective of the IGC’s work since its formation has been to develop a balanced and effective international legal framework for the protection of genetic resources (“GRs”), traditional knowledge (“TK”), and traditional cultural expressions (“TCEs”), and, more specifically, to prevent the misuse, misappropriation, and exploitation of these resources without the consent of, and benefit-sharing with, their rightful holders.²

For the last twenty-five years, the IGC has provided a vital platform for developing countries to advance their interests and seek to rebalance the global intellectual property (“IP”) system established by the late-nineteenth century Paris and Berne Conventions³ and currently grounded in the 1994 World Trade Organization (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁴ As significant holders of GRs, TK, and TCEs, the Global South’s key concern has been the ongoing large-scale misuse and uncompensated commercial exploitation of their genetic and cultural resources by economic actors from developed countries.⁵ Despite the access and benefit-sharing obligations imposed by the 1992

1. See Secretariat, World Intellectual Property Organization [WIPO] General Assembly, Twenty-Sixth (12th Extraordinary) Session, *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO Doc. WO/GA/26/6 (Aug. 25, 2000) [hereinafter WIPO General Assembly, *Matters Concerning*]; WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, *Report—Adopted by the Assembly*, WIPO Doc. WO/GA/26/10 (Oct. 3, 2000).

2. See WIPO General Assembly, *Matters Concerning*, *supra* note 1, at ¶¶ 13–24.

3. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at the Stockholm Revision Conference*, July 14, 1967, 24 U.S.T. 2140, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris*, July 24, 1971, 1161 U.N.T.S. 3.

4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

5. See, e.g., WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), WIPO Pub. No. 768(E) (2001) [hereinafter WIPO Pub. 768(E)]; Secretariat, WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore [hereinafter WIPO IGC], Sixteenth Session, *Submission of Botswana on Behalf of the Member States of the African Regional Intellectual Property Organization (ARIPO): The African Regional Intellectual Property Organization (ARIPO) Draft Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, WIPO Doc. WIPO/GRTKF/IC/16/INF/24 (Feb. 19, 2010); NIRMALYA SYAM & THAMARA ROMERO, MISAPPROPRIATION OF GENETIC RESOURCES AND

United Nations Convention on Biological Diversity (“CBD”),⁶ these practices continue to be prevalent, inequitable, and deeply injurious both economically and culturally to Indigenous Peoples and Local Communities (“IPLCs”).⁷

In May 2024, after long and at times divisive negotiations, WIPO member states, by consensus, concluded a groundbreaking Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (“Treaty”).⁸ The Treaty constitutes the first WIPO agreement explicitly recognizing the vital role of IPLCs as holders and stewards of genetic resources and associated traditional knowledge (“GRATK”).⁹ Fundamentally, the Treaty imposes mandatory requirements for the disclosure of the origin or source of GRATK within a patent application to facilitate equitable and transparent access to genetic and cultural resources, benefit-sharing with their rightful holders, and a reduction in the grant of patents improperly covering such resources.¹⁰

The principal goal of this Article is to provide a first-hand account of the negotiations that preceded the conclusion of the Treaty and to draw appropriate lessons therefrom. The account presented herein is based on my involvement with the IGC during a 15-year period starting in 2009 and ending in 2024. From 2009 to 2016, I led the Australian delegation to the IGC. During this time, I also served as a “facilitator” and as the “Friend of the Chair.” In the former role, I drafted negotiating texts in the IGC’s three principal subject matter areas: GRs, TK, and TCEs. In the latter role, I led mandate-renewal negotiations and directed the drafting of negotiating texts, while also working behind the scenes to move member states toward consensus. From 2016 to 2022, I was privileged to serve as the IGC Chair. In this role, I drafted and presented a

ASSOCIATED TRADITIONAL KNOWLEDGE: CHALLENGES POSED BY INTELLECTUAL PROPERTY AND GENETIC SEQUENCE INFORMATION, South Centre Research Paper No. 130 (2021).

6. Convention on Biological Diversity, June 5, 1992–June 4, 1993, 1760 U.N.T.S. 79 [hereinafter CBD].

7. See, e.g., SYAM & ROMERO, *supra* note 5, at 4–14; Julie Micalizzi, *Misappropriation of Genetic Resources in Africa: A Study of: Pentadiplandra Brazzeana, Impatiens Usambarensis, and Combretum Micranthum*, 8 CASE W. RES. J.L. TECH. & INTERNET 1, 2–6 (2017); William Fisher, *The Puzzle of Traditional Knowledge*, 67 DUKE L.J. 1511, 1513–36 (2018); JANE ANDERSON, INDIGENOUS/ TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY, ch. 2, (Duke U. Sch. of L. Ctr. for the Study of the Pub. Domain Issues Paper 2010).

8. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, May 24, 2024, WIPO GRATK/DC/7 [hereinafter Treaty], https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf [<https://perma.cc/V2NB-SFLX>].

9. *Id.* pmbl. ¶¶ 7–8, arts. 2, 3(2), 6.1–6.2, 10(1)(c).

10. *Id.* art. 3. The grant of patents may be improper because permission was not obtained from the rightful holders for the use of the resources, or because the claimed inventions are not novel or inventive in view of prior art that might be more easily identified if the origin or source of the resources were disclosed to the patent examiner. *Id.*

“Chair’s Text” on GRATK—a negotiating text that formed the basic proposal for the 2024 WIPO Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge (“Diplomatic Conference”) and, ultimately, the Treaty. Additionally, from 2022 to 2024, I provided advice to member states and Indigenous observers, and I attended the 2024 Diplomatic Conference as an expert for the African Union.

This Article is structured as follows: Part I briefly describes the lead-up to, and beginning of, text-based negotiations in the IGC and highlights the critical challenges encountered during the early (2000–2009) meetings. Part II illuminates the long pathway to the 2024 Treaty and the almost successful efforts to prevent a GRATK Diplomatic Conference from ever being convened. Part III describes the surprising geopolitical developments that induced WIPO member states to agree to a Diplomatic Conference for GRATK and provides observations from the Conference during which member states adopted the Treaty. Part IV draws lessons on successful multilateral negotiating leadership from the events described in Parts II and III that preceded the conclusion of the Treaty. Finally, Part V provides my views on the way forward for the ongoing text-based negotiations in the remaining two principal subject matter areas within the IGC’s mandate—TK and TCEs.

I would like to emphasize at the outset that the views offered in this Article are mine alone and are without prejudice to any member state’s position within the IGC negotiations. I also recognize that my reflections are undoubtedly colored by my perspective and memories of key events, some of which may differ from those of other individuals involved. However, as the architect and author of the basic proposal that resulted in the Treaty, I believe it is worthwhile to share my reflections on this historic event.

I. EARLY IGC NEGOTIATIONS (2000–09)

A. *Lead-Up to the Text-Based Negotiations*

Getting to a treaty in the IGC was always going to be a battle. While many Global South nations were concerned about the misappropriation of GRs, TK, and TCEs by Global North entities, such resources were not historically viewed as IP subject matter to consider at WIPO.¹¹ However, the adoption of the CBD in 1992, and the election of Dr. Kamil Idris as WIPO Director General in 1997, ultimately changed that.

11. See generally WIPO, *The First Twenty-Five Years of the World Intellectual Property Organization from 1967 to 1992*, WIPO Pub. No. 881 (E) (1992) (describing the evolution of WIPO in the first 25 years of its existence).

In 1998, Director General Idris established the Global Issues Division at WIPO, which spearheaded several fact-finding projects on the existence, creation, and protection of folklore, GRs, and Indigenous knowledge as IP, and raised awareness of issues and concerns relating to these topics among WIPO member states.¹² Then in 1999, in the lead-up to the WIPO Diplomatic Conference to adopt the Patent Law Treaty, Colombia introduced a proposal to include a disclosure-of-origin requirement for GRs and TK in patent applications.¹³ The ensuing controversy created an impasse among member states, one that was not resolved until the Director General proposed a compromise solution: the IGC as a place to discuss and address these new subject matter areas.¹⁴ Importantly, the IGC was not a standing committee, such as existed for patents, trademarks, and other standard IP subject areas.¹⁵ Instead, the WIPO General Assembly had to renew the IGC's work mandate every two years, embedding a certain precariousness into the very DNA of the IGC process.¹⁶

During the early years of the IGC's deliberations, the focus of its members was on identifying the fundamental policy objectives and principles for protecting GRs, TK, and TCEs within the IP system and on delineating the critical questions that needed to be addressed. To facilitate this process, the IGC Secretariat undertook numerous research studies and surveys to map and evaluate existing national approaches to the protection of genetic and cultural resources.¹⁷ The IGC also considered many submissions by member state

12. See, e.g., WIPO Pub. 768(E), *supra* note 5.

13. See Nuno Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPS Agreement: The Problem and The Solution*, 2 J. L. & POL'Y 371, 377 (2000).

14. See WIPO General Assembly, *Matters Concerning*, *supra* note 1, at ¶¶ 1–19.

15. See *Decision-making and Negotiating Bodies*, WIPO, [https://www.wipo.int/policy/en/\[https://perma.cc/KT5P-WAHY\]](https://www.wipo.int/policy/en/[https://perma.cc/KT5P-WAHY]) (listing WIPO standing committees).

16. See WIPO General Assembly, *Report—Adopted by the Assembly*, *supra* note 1. See generally Nuno Pires de Carvalho, *Sisyphus Redivivus? The Work of WIPO on Genetic Resources and Traditional Knowledge*, in ROUTLEDGE HANDBOOK OF BIODIVERSITY AND THE LAW 337, 337–44 (Charles McManis and Burton Ong eds., 2017) (describing this history and its continuing impact on the IGC negotiations); Ruth L. Okediji, *A Tiered Approach to Rights in Traditional Knowledge*, 58 WASHBURN L.J. 271, 284–96 (2019) (describing the establishment and early work of the IGC).

17. See, e.g., Secretariat, WIPO IGC, Fifth Session, *Composite Study on the Protection of Traditional Knowledge*, at 1–58, WIPO Doc. WIPO/GRTKF/IC/5/8 (Apr. 28, 2003); Secretariat, WIPO IGC, Fifth Session, *Consolidated Survey of Intellectual Property Protection of Traditional Knowledge*, at 1–11 & Annex, WIPO Doc. WIPO/GRTKF/IC/5/7 (Apr. 4, 2003); Secretariat, WIPO IGC, Fifth Session, *Practical Mechanisms for the Defensive Protection of Traditional Knowledge and Genetic Resources within the Patent System*, at 1–31, WIPO Doc. WIPO/GRTKF/IC/5/6 (May 14, 2003); Secretariat, WIPO IGC, Fifth Session, *Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing*, at 1–28, WIPO Doc. WIPO/GRTKF/IC/5/9 (Mar. 31, 2003); Secretariat, WIPO IGC, Fifth Session, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, at 1–9 & Annex, WIPO Doc. WIPO/GRTKF/IC/5/3 (May 2, 2003).

delegations setting forth proposals outlining the desired objectives, principles, and substantive elements of the envisioned international framework for the protection of GRs, TK, and TCEs. The most significant of these was a June 2005 proposal by the Delegation of the European Union entitled “Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications.”¹⁸ This proposal, which advocated for the introduction of a mandatory requirement to disclose the country of origin or source of GRATK in patent applications,¹⁹ played a vital role in later IGC negotiations.

As the IGC entered its ninth year of deliberations, developing countries became increasingly frustrated with the slow pace of the IGC’s work in addressing their concerns over the misuse and misappropriation of GRs, TK, and TCEs. They pushed for an expedited commencement of formal negotiations aimed at the conclusion of a binding instrument, or instruments, in the three core subject matter areas.²⁰ To facilitate this outcome, in mid-2009, the African Group²¹ put forward a proposal for the commencement of text-based negotiations on a legally binding treaty, or treaties, as part of the IGC’s biannual mandate-renewal negotiations during the IGC’s Fourteenth Session.²²

Despite significant efforts by the African Group and various stakeholders, as well as several rounds of amendments to the Group’s proposal, the IGC did not reach a consensus. The critical hurdle preventing agreement was the fact that the proposal indicated that the envisioned instrument would be “legally binding,”²³ which drew opposition from some developed countries, most notably the United States.²⁴ To break the deadlock, Ambassador Ian B. McKinnon of New Zealand undertook informal consultations before and during the Thirty-Eighth (Nineteenth Ordinary) Session of the WIPO General Assembly.

18. Delegations of the European Commission & Luxembourg, WIPO IGC, Eighth Session, *Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications*, WIPO Doc. WIPO/GRTKF/IC/8/11 (May 17, 2005) [hereinafter *2005 EU Proposal*].

19. *Id.* ¶¶ 2–5.

20. See, e.g., Secretariat, WIPO IGC, Fourteenth Session, *Report* ¶¶ 13, 15, 19, 21–32, 34–43, 49–51, 54–55, WIPO Doc. WIPO/GRTKF/IC/14/12 (Oct. 1, 2009).

21. Within WIPO, member states are grouped by region. The groupings include the African Group, the Asia Pacific Group, the Group of Latin American and Caribbean Countries (“GRULAC”), the Central European and Baltic States Group (“CEBS”), the Central Asian, Caucasus and Eastern European Countries (“CACEEC”), and Group B (developed countries). E.g., *General Statements by Delegations: Assemblies of the Member States of WIPO*, WIPO, https://www.wipo.int/about-wipo/en/assemblies/2020/a_61/statements.jsp?meeting_id=56286 [https://perma.cc/YT52-FKWM].

22. See Secretariat, WIPO IGC, Fourteenth Session, *Proposal of the African Group on the Mandate of the Intergovernmental Committee*, WIPO Doc. WIPO/GRTKF/IC/14/8 REV. (June 26, 2009).

23. See *id.* at Annex ¶ 4 (“The Committee is requested to submit to the 2011 GA a text for an internationally legally binding instrument/instruments on TCEs, TK and GR and recommend a date for the Diplomatic Conference as agreed in its work program.”).

24. See WIPO, *Report*, *supra* note 20 at ¶¶ 102–03, 148, 155–56.

Thanks to his initiative, an agreement was reached on a new (2010–11) IGC mandate, which included an amended version of the African Group’s proposal and called on the IGC to “undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs.”²⁵ Further, the IGC was requested “to submit to the 2011 General Assembly the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs.”²⁶

The 2010–11 IGC mandate, while somewhat ambiguous, represented a seismic shift in the IGC’s work. It significantly raised expectations amongst developing countries and IPLCs that WIPO would finally address the misuse and misappropriation of their genetic and cultural resources. Importantly, it also signaled a convergence of negotiating positions between developing and selected developed countries, including, most notably, member states with significant IPLCs and endemic GRs and high-income countries that had introduced GRATK disclosure requirements within their patent legislation (for example, Switzerland).

B. *Challenges Encountered During Early Text-Based Negotiations*

1. *Historical Legacies and Policy Conflicts*

Having finally agreed on a clear objective for the IGC’s work, the scale of the task at hand and the associated challenges quickly became apparent. The protection of GRs, TK, and TCEs was still a relatively new topic at the time and one that challenged both traditional doctrinal approaches to the protection of IP rights as well as the Global North’s longstanding economic and geopolitical policy objectives inaugurated during the industrial/colonial period of the nineteenth century.²⁷ Further, the protection of genetic and cultural resources involves cross-cutting moral and economic rights applicable across all traditional IP subject matter areas.²⁸ Understandably, then, member states’ policy and legislative approaches to the protection of GRs, TK, and TCEs differed greatly upon the commencement of text-based negotiations.²⁹ Similar

25. WIPO General Assembly, Thirty-Eighth (19th Ordinary) Session, *Report—adopted by the General Assembly* ¶ 217, WIPO Doc. WO/GA/38/20 (Oct. 1, 2009). As evident, the requirement that the instrument(s) be “legally binding” was not included in the 2010–11 IGC mandate. *Id.*

26. *Id.* at ¶ 217(d).

27. See, e.g., ANDERSON, *supra* note 7, at §§ 1.1–1.2.

28. See, e.g., Secretariat, WIPO IGC, Sixteenth Session, *The Protection of Traditional Knowledge: Revised Objectives and Principles*, Annex, at 13–43, WIPO Doc. WIPO/GRTKE/IC/16/5 (Mar. 22, 2010).

29. See, e.g., WIPO IGC, *Consolidated Survey of Intellectual Property Protection of Traditional Knowledge*, *supra* note 17, Annex, at 1–9; WIPO IGC, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, *supra* note 17, at ¶¶ 197–209.

variances were present in the ways members dealt with IPLCs, with some member states not formally recognizing their existence at all.³⁰ Importantly, many IGC delegates had no lived experience with IPLCs.

Unsurprisingly, the significant diversity among WIPO member states' domestic approaches toward the protection of genetic and cultural resources led to the formulation of a wide range of objectives for the text-based negotiations by various IGC delegations. The objectives that were proposed for the negotiations included, most notably, (i) protecting the rights of IPLCs and knowledge or resource holders; (ii) protecting the rights and interests of users of genetic and cultural resources, such as industry and research institutions; (iii) safeguarding cultural heritage and GRs; (iv) protecting the public domain; (v) enhancing the integrity and transparency of the patent system; and (vi) supporting innovation and creativity, including knowledge and technology transfer.³¹

Adding to the complexity of the negotiations, the IGC was tasked to bridge the so-called "North-South divide"—the disparity in approaches towards IP regulation among developed and developing countries. Furthermore, the negotiations had to appropriately reflect the concerns and goals of a diverse set of stakeholder groups with substantial and divergent interests in the outcomes of the negotiations. The principal stakeholder groups whose interests had to be accommodated included, in particular, (i) knowledge-based and creative industries (for example, pharmaceutical, biotech, and arts and crafts industries);³² (ii) knowledge institutions (for example, libraries, museums, and arts centers);³³ (iii) IPLCs;³⁴ and (iv) U.N. bodies whose work intersects with that of the IGC,

30. See, e.g., J.S. FINGLETON, *LEGAL RECOGNITION OF INDIGENOUS GROUPS* 5–7 (FAO Legal Papers Online 1998).

31. See, e.g., WIPO IGC, *Report, supra* note 20, at ¶¶ 13–60; Secretariat, WIPO IGC, Twentieth Session, *Proposal of the African Group on Genetic Resources and Future Work*, Appendix, at 4–6, WIPO Doc. WIPO/GRTKF/IC/20/INF/12 (Oct. 17, 2012); see also Secretariat, WIPO IGC, Twentieth Session, *Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources*, Annex, at 1–7, WIPO Doc. WIPO/GRTKF/IC/20/4 (Oct. 10, 2011); Secretariat, WIPO IGC, Twentieth Session, *Like-Minded Countries Contribution to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources*, Annex, at 2–3, WIPO Doc. WIPO/GRTKF/IC/20/6 (Oct. 10, 2011).

32. See generally Susy Frankel, *The Creative Sector and Traditional Knowledge*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CREATIVE INDUSTRIES* 230 (Abbe E.L. Brown & Charlotte Waelde eds., 2018) (outlining how the creative sector utilizes TK).

33. See generally Jane Anderson & Molly Torsen, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, WIPO Publication No.1023(E) (2010) (outlining available options for the protection of TCEs by cultural institutions), https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf [https://perma.cc/T3KG-MZPX].

34. IPLCs have had a unique and distinct status in the IGCs negotiations as both creators and holders of GRs, TK, and TCEs. Whilst this is not formally recognized in the IGC mandate, a precedent has been established within the IGC's working methods for their active participation in the negotiations. This includes participation in informal meetings and small contact groups—an opportunity not offered to other observers. However, they require a member state

including the CBD, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), the Food and Agriculture Organization (“FAO”), and the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).³⁵

2. *Change: The Only Constant*

The fact that significant changes had occurred within the international legal environment since the establishment of the IGC added complexity to the negotiations. In the first decade of the new millennium, states adopted a range of new international agreements that intersect the work of the IGC. Table 1 below enumerates the most important of these agreements.

Table 1: Overlapping International Agreements Adopted from 2000 to 2010

Name of Agreement	Year	Institution	Principal Objective(s)
International Treaty on Plant Genetic Resources for Food and Agriculture ³⁶ (“ITPGRFA”)	2001	FAO	Facilitate conservation and sustainable use of plant GRs for food and agriculture and the fair and equitable sharing of the benefits arising from their use

to support any proposal they put forward. This special status reflects that they have specific policy interests that intersect with the interests of member states and obligations established in the UNDRIP. These include (i) protecting TK or TCEs against misappropriation, unauthorized use, or disclosure of secret or sacred TK or TCEs; (ii) preventing insulting, derogatory, or culturally and spiritually offensive uses of TK or TCEs; (iii) preventing the appropriation of the reputation or distinctive character of TCEs; (iv) benefiting, financially and otherwise, from TK and TCEs they have created and GRs they have stewarded, improved, and modified; and (v) preventing the failure to acknowledge the source when GRS, TK, and TCEs are used. See, e.g., WIPO IGC, *Report*, *supra* note 20, at ¶¶ 57–60, 64; Terry Williams (Tulalip Tribes of Washington, United States of America), WIPO IGC, Fourteenth Session, *WIPO Panel on “Indigenous and Local Communities’ Concerns and Experiences in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources”*—*Experiences from the United States of America*, at 2–6, WIPO Doc. WIPO/GRTKF/IC/14/INF/5(a) (June 29, 2009); Dewan Mohd Abed (Executive Director, Organization for Social Action and Development, Bangladesh), *WIPO Panel on “Indigenous and Local Communities’ Concerns and Experiences in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources”*—*Experiences from Bangladesh*, at 3–22, WIPO Doc. WIPO/GRTKF/IC/14/INF/5(c) (June 29, 2009).

35. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]; see also WIPO IGC, *Report*, *supra* note 20, at ¶ 56.

36. International Treaty on Plant Genetic Resources for Food and Agriculture, *opened for signature* Nov. 3, 2001, T.I.A.S. 17-313, 2400 U.N.T.S. 303 (entered into force June 29, 2004).

Name of Agreement	Year	Institution	Principal Objective(s)
Convention for the Safeguarding of the Intangible Cultural Heritage ³⁷	2003	UNESCO	Safeguard and ensure respect for the intangible cultural heritage of communities, groups, and individuals
Convention on the Protection and Promotion of the Diversity of Cultural Expressions ³⁸	2005	UNESCO	Safeguard and enhance the diversity of cultural expressions; ensure the sustainability of cultural practices, traditions, and creative works
UNDRIP ³⁹	2007	U.N.	Recognize, safeguard, and promote the individual and collective rights of Indigenous Peoples, including their rights to self-determination, culture, identity, language, and traditions
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ⁴⁰	2010	CBD	Facilitate the sharing of monetary and non-monetary benefits arising from the utilization of GRATK with the countries or communities that provide them; provide transparent guidelines for access to GRATK; enhance the protection of TK associated with GRs

In line with momentous changes at the multilateral level, there was also significant growth in the adoption of regional and national regimes for the protection of GRs, TK, and TCEs, as well as of related access and benefit-sharing legislation. Examples of regional instruments include the Andean Community's Decision No. 486 Establishing the Common Industrial Property Regime,⁴¹ and

37. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3.

38. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 2440 U.N.T.S. 311.

39. UNDRIP, *supra* note 35.

40. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, *adopted* Oct. 29, 2010, *opened for signature* Feb. 2, 2011, 3008 U.N.T.S. 3, Doc. UNEP/CBD/COP/DEC/X/1 (entered into force Oct. 12, 2014) [hereinafter Nagoya Protocol].

41. Andean Community Decision No. 486 Establishing the Common Industrial Property Regime, Sept. 14, 2000. The decision obligated member states to, among other things, "safeguard and respect their biological and genetic heritage and also the traditional knowledge of their [I]ndigenous [Peoples]" and to condition the "the grant of patents relating to inventions

the African Regional IP Organization's Swakopmund Protocol on the Protection of TK and Expressions of Folklore.⁴² At the national level, there was a corresponding growth in the introduction of legal norms relating to the disclosure of the source or origin of GRATK, with over thirty disclosure regimes established.⁴³ While often having similar policy objectives, these regimes diverged considerably in both scale and scope, posing significant challenges to industry in terms of accessibility, legal certainty, and high transaction costs.⁴⁴ Importantly, member states with existing GRs, TK, and TCEs regimes tended to promote their national legislative and regulatory approaches, which hindered consensus-building within the IGC.

The rapid emergence and growth of new technologies, including, most notably, digital sequencing and artificial intelligence, added additional complexity to the IGC's negotiations. The speed with which these technologies evolved, and the myriads of new possibilities they opened for the use (and misuse) of GRs, TK, and TCEs, created new areas of disagreement among member states.

The necessity of renegotiating the IGC's mandate every two years posed an additional negotiating challenge. The recurring mandate discussions often exacerbated policy differences among member states and provided opportunities for members to dilute the 2010–11 mandate.⁴⁵ The mandate negotiations also consumed time that the IGC might otherwise have directed to substantive progress.

II. PATHWAY TO THE DIPLOMATIC CONFERENCE (2010–22)

A. *Moving the Ball Forward: Refinements to IGC Negotiating Processes*

The agreement, formed during the 2010–11 IGC mandate negotiations,⁴⁶ to conduct text-based negotiations led to the development of three draft

developed on the basis of material derived from that heritage or knowledge" on the material having been acquired lawfully and in accordance with the norms of Indigenous communities. *Id.*, art. 3.

42. Organization of African Unity, Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Aug. 9, 2010. The principal objectives of the Protocol are "(a) to protect traditional knowledge holders against any infringement of their rights as recognized by [the] Protocol; and (b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context." *Id.* §1.1.

43. See *Disclosure Requirements Table related to genetic resources and/or traditional knowledge*, WIPO (Jan. 10, 2024), https://www.wipo.int/tk/en/docs/genetic_resources_disclosure.pdf [<https://perma.cc/YYF2-VTU3>].

44. See *id.*

45. An extreme example was the 2014 mandate negotiations, during which member states could not agree on the IGC's work program, which resulted in the IGC failing to meet in 2015. See WIPO IGC, Twenty-Eighth Session, *Report—Adopted by the Committee*, at 46 ¶ 109, WIPO Doc. WIPO/GRTKF/IC/28/11 (Feb. 15, 2016).

46. See WIPO General Assembly, *Report—adopted by the General Assembly*, *supra* note 25, at ¶ 217.

negotiating texts covering GRATK, TK, and TCEs, respectively.⁴⁷ Three inter-sessional expert working groups initially crafted the texts in 2010–11. The working groups then presented the drafts to the IGC for consideration, and they became the primary negotiating texts.

However, as the negotiations progressed, the texts became heavily “bracketed” due to the inclusion of divergent negotiating options reflecting member states’ distinct negotiating objectives and policy approaches.⁴⁸ This is because, under applicable WIPO rules, each member state has the right to have textual proposals reflected in the negotiating text, even if they are directly contradictory to the proposals of other member states.⁴⁹ Where members fail to unanimously agree to a proposal, it is outlined in a bracket within the applicable provision of the negotiating text. To reduce the number of alternative textual proposals for key provisions, “facilitators” were appointed,⁵⁰ from the IGC negotiators present, to simplify the texts for plenary approval.

The introduction of informal sessions further enhanced the negotiating process. The principal advantage of informal sessions was that their proceedings were not reported (except for transcripts provided to the facilitators), allowing for member state and observer negotiators to speak more freely and openly explain positions. The sessions also featured reduced representation,⁵¹ enabling a smaller group of key delegates to develop personal relationships which in turn helped to promote shared understanding and bridge policy divides. However, even informal sessions failed to resolve all fundamental differences among the negotiating parties. Concerning the protection of GRATK, the key disagreements largely revolved around the role that existing IP systems and their relationship to access and benefit-sharing (“ABS”) obligations should play.⁵² Similarly, critical differences persisted regarding the envisioned

47. See Secretariat, WIPO IGC, First Intersessional Working Group, *Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore Prepared at IWG 1*, WIPO Doc. WIPO/GRTKF/IWG/1/3 (Sept. 15, 2010); Secretariat, WIPO IGC, Second Intersessional Working Group, *Draft Articles on the Protection of Traditional Knowledge Prepared at IWG 2*, WIPO Doc. WIPO/GRTKF/IWG/2/3 (Mar. 17, 2011); Secretariat, WIPO IGC, Third Intersessional Working Group, *Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources Prepared at IWG 3*, WIPO Doc. WIPO/GRTKF/IWG/3/17 (Mar. 16, 2011).

48. See, e.g., WIPO IGC, Thirty-First Session, *The Protection of Traditional Knowledge: Draft Articles*, Annex, at 9–10, WIPO Doc. WIPO/GRTKF/IC/31/4 (May 13, 2016) (draft of article 3); Secretariat, WIPO IGC, Thirty-Third Session, *The Protection of Traditional Cultural Expressions: Draft Articles*, Annex, at 7–9, WIPO Doc. WIPO/GRTKF/IC/33/4 (Dec. 5, 2016) (draft of article 3).

49. GEN. R. P. WIPO 21(a) (1970, as amended) [hereinafter WIPO RULES OF PROCEDURE].

50. The facilitators were appointed by the IGC Chair following their approval by member states.

51. Participants in informal sessions included Regional Coordinators as well as representatives of the European Union, the Like-Minded Group of Countries, and the Indigenous Caucus.

52. See, e.g., WIPO IGC, Twenty-Sixth Session, *Report—Adopted by the Committee*, at 29–31 ¶ 63, WIPO Doc. WIPO/GRTKF/IC/26/8 (Mar. 14, 2014).

framework for the protection of TK and TCEs—whereas developing countries and IPLCs favored⁵³ a *sui generis* rights-based approach,⁵⁴ most developed countries preferred⁵⁵ a non-mandatory measures-based approach utilizing existing IP regimes.⁵⁶

To move the process forward, I implemented further refinements to the IGC's working processes following my appointment as IGC Chair in 2016. The first was a significant reduction of the time the IGC discussed the negotiating texts in the plenary. Under the new method, the IGC used the plenary to conduct only initial discussions on core issues within key provisions. Detailed discussions during one or more informal sessions, based on a Chair's note issued before each session, would then follow the plenary. The IGC retained the facilitation process but with additional guidance that sought to narrow gaps while maintaining the substantive integrity of proposals by delegates, particularly those moving towards consensus. Although most delegates supported this approach, some believed it impinged on their right to have their textual proposals included within the negotiating texts. Additional measures were taken to address this concern, which led to an increased number of alternate textual proposals for key provisions.

A critical barrier to the advancement of IGC negotiations was the position of most developing countries that the IGC should agree on all three negotiating texts before any agreement, or agreements, were adopted. In my opinion, this was never a viable negotiating strategy, which was evidenced by the fact that those member states that persistently impeded the negotiations also supported this approach. Accordingly, convincing demandeur countries to drop their all-or-nothing posture and adopt an asynchronous, incremental approach to the negotiations reflecting the varying maturity of the three texts was essential for moving the negotiations forward.

B. *Prioritizing the GRATK Negotiating Track*

By 2018, the three negotiating texts were at significantly different levels of maturity. While the TK and TCEs drafts had made some progress thanks to

53. See, e.g., WIPO IGC, Thirty-First Session, *Report—Adopted by the Committee*, ¶¶ 141, 177, 185, 187, WIPO Doc. WIPO/GRTKF/IC/31/10 (Nov. 28, 2016) (interventions by Egypt, Namibia, and Bolivia arguing in favor of a mandatory disclosure requirement).

54. This approach aims to establish a new set of rights specifically for TK and TCEs.

55. See, e.g., WIPO IGC, *Report—Adopted by the Committee*, *supra* note 53, at ¶ 183 (intervention by Japan on behalf of the Delegations of Canada, Republic of Korea, and the United States, arguing against the introduction of a mandatory disclosure requirement).

56. A measures-based approach refers to the establishment of additional measures within extant IP regimes. The measures may be administrative or legal in nature. An example of an administrative measure is the establishment of a list of prohibited Indigenous marks or symbols within the trademark system.

the inclusion of a tiered approach to protection,⁵⁷ fundamental disagreements persisted over the scope of the instruments and over whether they should incorporate a measures- or a rights-based approach to protection.⁵⁸ The GRs text, on the other hand, had matured to a point where it included only two competing approaches: (i) a “defensive measures” approach, which proposed non-mandatory, database-focused measures at the national level to prevent erroneous granting of patents relating to GRATK;⁵⁹ and (ii) mandatory disclosure of origin or source of GRATK within an IP application.⁶⁰

Eventually, the mandatory disclosure approach outcompeted its rival, thanks in large part to the efforts of two informal member groupings. The first was the “Rainbow Coalition” led by Switzerland and, subsequently, Australia.⁶¹ Though relatively small, this grouping included members from Group B (developed countries), the African Group, and the Latin American and Caribbean Group (“GRULAC”). The second was a larger alliance known as the “Like-Minded Group of Countries,” which included member states from the Global South.⁶² Additionally, while not formally members of these informal groups, several EU members actively supported their efforts because they were consistent with the mandatory disclosure regime outlined in the EU’s 2005 proposal.⁶³

In 2018, with support from key *demandeur* countries, I decided to focus the IGC’s efforts on moving the GRATK text—the most mature draft with the narrowest scope—towards a binding agreement. To attain this objective, I had to overcome several key challenges. First, a small group of influential member states, including the United States, Japan, and South Korea, opposed any mandatory disclosure requirement, a position supported by the pharmaceutical,

57. A tiered approach provides differentiated protection based on the level of diffusion of TK or TCEs and the extent of control of the TK or TCEs by the beneficiaries. Such an approach categorizes TK or TCEs into clusters, or tiers, which are afforded either full protection, partial protection (for example, moral rights only), or no protection. See generally Okediji, *supra* note 16, at 302–20 (outlining a tiered approach to the protection of TK).

58. See Secretariat, WIPO IGC, Thirty-Eighth Session, *The Protection of Traditional Knowledge: Draft Articles*, Annex, at arts. 5–5bis & 7, WIPO Doc. WIPO/GRTKF/IC/38/4 (Sept. 28, 2018); Secretariat, WIPO IGC, Thirty-Eighth Session, *The Protection of Traditional Cultural Expressions: Draft Articles*, art. 5, WIPO Doc. WIPO/GRTKF/IC/38/5 (Sept. 28, 2018).

59. See Secretariat, WIPO IGC, Thirty-Sixth Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, at 15–16, WIPO Doc. WIPO/GRTKF/IC/36/4 (Apr. 10, 2018).

60. See *id.* at 10–12.

61. See, e.g., Secretariat, WIPO IGC, Fortieth Session, *Draft Report*, ¶ 173, WIPO Doc. WIPO/GRTKF/IC/40/20 Prov. 2 (Sept. 30, 2019) [hereinafter *IGC 40 Report*] (intervention by Switzerland at IGC 40 in support of a mandatory disclosure requirement).

62. The “Like-Minded Group of Countries” comprised approximately 140 non-*demandeur* member states. Chidi Oguamanam, *Understanding African and Like-Minded Countries’ Position at WIPO-IGC*, 60 IDEA 151, 178 n.80 (2020).

63. See 2005 EU Proposal, *supra* note 18.

biotech, and crop industries.⁶⁴ Secondly, while most member states supported a mandatory disclosure regime, they disagreed on its scope.⁶⁵ These disagreements mirrored variations in existing national and regional regimes as well as member states' policy priorities.⁶⁶ Additionally, members with existing disclosure regimes sought to maintain policy space for their national or regional systems, which reduced their willingness to compromise.

My initial task was to develop a consensus text that members favoring a mandatory disclosure regime would support. This necessitated resolving critical differences among the member states in the following areas:

- (1) **IP rights covered.** A key outstanding issue was whether the instrument should apply exclusively to patent rights and applications, or cover other types of IP (for example, designs) as well.⁶⁷ In some mandatory disclosure regimes, for example, those of Switzerland and China, disclosure requirements apply only to patents.⁶⁸ In other countries, such as Ethiopia and Brazil, the disclosure requirement applies to all IP rights.⁶⁹
- (2) **Scope of protected subject matter.** A critical issue for some Group B (developed) states was whether TK associated with GRs should be included in the negotiations, considering that IGC negotiations on TK were still ongoing and the definition of TK was yet to be agreed upon.⁷⁰ Additionally, there was no consensus regarding the inclusion of derivatives and digital sequence information ("DSI").⁷¹
- (3) **Trigger language.** At the heart of any disclosure mechanism is the trigger which prompts the disclosure requirement. Two divergent approaches had to be reconciled in the negotiations: (i) a broad trigger mandating

64. See, e.g., WIPO IGC, Thirty-Fifth Session, *Report—Adopted by the Committee*, at ¶¶ 26, 28, WIPO Doc. WIPO/GRTKF/IC/35/10 (June 25, 2018) (interventions by Korea and Japan at IGC 35 against the mandatory disclosure requirement); WIPO IGC, *Report—Adopted by the Committee*, *supra* note 20 at ¶¶ 129, 135, 151 (interventions by the United States at IGC 37 against the mandatory disclosure requirement and in favor of opposition measures to prevent the erroneous granting of patents).

65. See Secretariat, WIPO IGC, Fortieth Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, arts. 2–6, WIPO Doc. WIPO/GRTKF/IC/40/6 (Apr. 9, 2019) [hereinafter *GRs Consolidated Text*].

66. See *supra* notes 27–35 and accompanying text.

67. See *GRs Consolidated Text*, *supra* note 65, arts. 2–4.

68. See Bundesgesetz über die Erfindungspatente, Loi fédérale sur les brevets d'invention, Legge federale sui brevetti d'invenzione [Federal Act on Patents for Inventions] June 22, 2007 (effective July 1, 2008), SR 232.14, RS 232.14, art. 49a (Switz.); Patent Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective June 1, 2021), 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 717, arts. 5 & 26.

69. See Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006, arts. 4–5 (Eth.); Lei No. 13.123, de 20 de maio de 2015, art. 11, Diário Oficial da União [D.O.U.] de 14.5.2015 (Braz.).

70. See *GRs Consolidated Text*, *supra* note 65, Part I ("[Mandatory] Disclosure"), arts. 3–4.

71. See *id.* arts. 1, 5.

that any GRATK (including derivatives) *utilized in* an innovation must be disclosed, and (ii) a narrow trigger requiring that an innovation *must depend* on the specific properties of the GRs or associated TK.⁷²

- (4) **Nature of the disclosure requirement.** As with the trigger language, there were two competing negotiating options in relation to the nature of the required disclosure: (i) a formalities-based regime that is administrative in nature, and (ii) a substantive mandatory disclosure requirement with consequences for patentability.⁷³
- (5) **Content of disclosure.** Members disagreed on what information the regime should require an IP applicant to disclose. Options proposed by members included the following: (i) the country of origin of the GRATK, (ii) the source of the GRATK, and (iii) information pertaining to compliance with ABS requirements, including prior informed consent.⁷⁴
- (6) **Relationship with existing ABS regimes.** As with the trigger language, there were different perspectives on whether to link the envisioned instrument with existing ABS regimes, particularly the one set forth in the CBD and the Nagoya Protocol.⁷⁵ While some members sought to incorporate a specific linkage within the negotiating text, others preferred to exclude the requirement.⁷⁶
- (7) **Consequences of non-compliance.** A critical point of contention among members was post-grant sanctions, in particular revocation.⁷⁷ Developed countries strongly argued that, in the interests of legal certainty, states should not revoke IP rights based solely on an applicant's failure to meet the disclosure requirement. However, several developing countries already had a revocation remedy within their disclosure regimes and were arguing strongly in favor of its inclusion in the agreement.⁷⁸ Nevertheless, there was a general recognition among the members that revocation was not the optimal remedy from the perspective of the GRATK holder, since the unauthorized use of the resources would remain uncompensated.⁷⁹ At the same time, most members agreed that in cases involving willful or fraudulent conduct, revocation could be the appropriate sanction.⁸⁰

72. See *id.* art. 4.1.

73. See *id.* arts. 4, 6.

74. See *id.* art. 4.

75. See CBD, *supra* note 6, art. 15; Nagoya Protocol, *supra* note 40, arts. 5–7.

76. See *GRs Consolidated Text*, *supra* note 65, pmb. & Part I (“[Mandatory] Disclosure”), art. 5.

77. See *id.* art. 6.2(b)–6.3.

78. See, e.g., WIPO IGC, Thirty-Sixth Session, *Report—Adopted by the Committee*, ¶ 195, WIPO Doc. WIPO/GTRKF/IC/36/11 (Dec. 10, 2018) (intervention of Brazil at IGC 36 arguing in favor of a revocation remedy).

79. See *id.* ¶ 42.

80. See *id.* ¶¶ 165, 192, 195–96.

C. *Development of the Chair's Text*

The IGC's 2018–19 mandate provided a critical opportunity to develop a consensus text that the proponents of mandatory disclosure would support. To expedite the IGC's work, the mandate provided for the establishment of “ad hoc expert panels,” which would meet before formal IGC meetings.⁸¹ Based on consultations with members, the Chair would determine the questions or issues to be posed to the expert panel.⁸² Whilst a panel would produce no papers, its co-chairs would present its findings to the IGC plenary for consideration.⁸³

The first expert panel meeting took place at IGC 36 (June 2018), the second and final GRATK meeting of the 2018–19 IGC mandate period.⁸⁴ The panel's principal agenda item was the scope of the mandatory disclosure regime.⁸⁵ Critically, the panel was successful in delineating a potential compromise proposal, which eventually led to the inclusion of a revised mandatory disclosure provision in the draft GRATK negotiating text combined with an agreement to apply it only to patent applications, with a consideration of the applicability of the provision to other IP areas reserved for a future review session. A significant number of members across the regional groups supported the revised provision. However, opposing a mandatory disclosure requirement, the United States blocked consensus on the revised GRATK negotiating text, known as the Consolidated Text.⁸⁶

From my perspective as the Chair, the move by the U.S. delegation represented a pivotal moment that provided an opportunity to shift negotiations away from the Consolidated Text, which by then had clearly reached its use-by date, with no clear way forward to narrow its conflicting provisions. I therefore proceeded to advise the IGC that I would prepare a “Chair's Text” on GRATK under my own authority.⁸⁷

My objectives were threefold. First, I wanted to develop a text that appropriately balanced the rights and interests of both holders and users of GRATK, while appropriately reflecting the public interest. Secondly, I sought to provide negotiating parties with detailed information on available modalities for a mandatory disclosure requirement to enhance their capacity to make informed

81. See WIPO IGC, Thirty-Fifth Session, *Decisions of the Thirty-Fifth Session—Adopted by the Committee*, at 3, WIPO Doc. WIPO/GRTKF/IC/35/DECISIONS (Mar. 26, 2018).

82. See *id.*

83. See *id.*

84. See Secretariat, WIPO IGC, Thirty-Sixth Session, *Draft Agenda Prepared by the Secretariat*, WIPO Doc. WIPO/GRTKF/IC/36/1 PROV. 3 (June 5, 2018); WIPO IGC, *Report—Adopted by the Committee*, *supra* note 78.

85. See WIPO IGC, *Draft Agenda Prepared by the Secretariat*, *supra* note 84.

86. See WIPO IGC, *Report—Adopted by the Committee*, *supra* note 78, at ¶ 224.

87. See *id.* at ¶ 225.

decisions. Finally, I wanted to address the risks associated with the growth in regional and national disclosure regimes, which varied significantly in scope and content. These differences imposed undue burdens on GRATK users by reducing accessibility and legal certainty, thus creating transaction costs that could negatively impact innovation.

Following the conclusion of IGC 36, four IGC meetings remained within the 2018–19 mandate. The first three were to focus on TK and TCEs, while the final meeting (IGC 40) was to feature a stock-take of progress made and the formulation of recommendations to the WIPO General Assembly. This provided a ten-month window for me to draft the Chair's Text before presenting it for consideration at IGC 40.

Before proceeding to draft the Chair's Text, I carefully reviewed relevant IGC documents, including key proposals made by the EU, the Africa Group, Switzerland, and the United States;⁸⁸ two Joint Recommendations on GRATK and databases submitted by the Delegations of Canada, Japan, South Korea, Norway, and the United States;⁸⁹ and the most recent, blocked revision of the GRATK negotiating text, including the meeting records.⁹⁰ I also reviewed a draft proposal based on informal cross-group discussions prepared by Switzerland. Additionally, I conducted a detailed review of existing national and regional disclosure regimes. This review, and associated consultations, provided invaluable insights into the divergences among members' perspectives and policy objectives, which I would need to address to develop a consensus text.

When preparing the Chair's Text, I identified several principles to guide my work. First, the document was to be legally binding and mutually beneficial to both holders and users of GRATK. Secondly, the core element of the Text was to be a *mandatory* disclosure regime, since a non-mandatory regime would be unenforceable and thus, merely symbolic. I also decided to include defensive measures (for example, information systems) as a complementary tool

88. See 2005 EU Proposal, *supra* note 18; Secretariat, WIPO IGC, Seventeenth Session, *Proposal of the African Group on Genetic Resources and Future Work*, WIPO Doc. WIPO/GRTKF/IC/17/10 (Jan. 10, 2011); Delegation of Switzerland, WIPO IGC, Eleventh Session, *Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications: Proposals by Switzerland*, WIPO Doc. WIPO/GRTKF/IC/11/10 (Jan. 10, 2011); Delegation of the United States of America, WIPO IGC, Thirty-Eighth Session, *The Economic Impact of Patent Delays and Uncertainty: US Concerns about Proposals for New Patent Disclosure Requirements*, WIPO Doc. WIPO/GRTKF/IC/38/15 (Nov. 16, 2018).

89. See Delegations of Canada, Japan, Norway, the Republic of Korea & the United States of America, WIPO IGC, Thirty-Eighth Session, *Joint Recommendation on Genetic Resources and Associated Traditional Knowledge*, WIPO Doc. WIPO/GRTKF/IC/38/10 (Nov. 16, 2018); Delegations of Canada, Japan, the Republic of Korea & the United States of America, WIPO IGC, Thirty-Eighth Session, *Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, WIPO Doc. WIPO/GRTKF/IC/38/11 (Nov. 16, 2018).

90. See *GRs Consolidated Text*, *supra* note 65.

reinforcing the disclosure system. Thirdly, the Text was to be a living document that would be amended or enhanced in the future in light of the outcomes of its implementation and to reflect new technological developments (for example, DSI). Finally, the Text was to be congruent with, and supportive of, relevant international agreements—particularly the CBD and ITPGRFA—and openly cognizant of the rights and aspirations of IPLCs reflected in the UNDRIP.⁹¹

Table 2 below briefly outlines the content of selected provisions included in the draft Chair's Text.⁹²

Table 2: Draft Chair's Text: Overview of Key Articles

No.	Article Title	Details
1	Objectives	<ul style="list-style-type: none"> • The primary objective was to establish a transparency mechanism for the use of GRATK, prevent their misappropriation, facilitate benefit-sharing, and reduce the incidence of improperly granted patents on GRATK. • Reflecting a compromise position put forward at IGC 36, the Text limited the instrument's scope to the patent system, with the possibility of inclusion of other rights following a mandatory review process. • The instrument featured new formalities, not new substantive patentability requirements.
2	List of Terms	<ul style="list-style-type: none"> • The definitions of "genetic resources," "genetic material," "country of origin," and "in situ conditions" duplicated those in the CBD.⁹³ • The Text stipulated that claimed inventions "materially/directly based on" GRATK triggered mandatory disclosure. • Considering ongoing discussions within the IGC on the subject, the instrument did not define the term "traditional knowledge."

91. See UNDRIP, *supra* note 35, pmbl; see also *supra* note 34.

92. Ian Goss (Chair of the WIPO IGC), *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, WIPO Doc. WIPO/GRTKF/IC/40/CHAIR TEXT (Apr. 30, 2019) [hereinafter *Chair's Text*].

93. See CBD, *supra* note 6, art. 2.

No.	Article Title	Details
3	Disclosure Requirement	<ul style="list-style-type: none"> • The Text sought to ensure that the disclosure requirement is workable in practice and reflects the various circumstances under which GRATK can be sourced, meaning that no requirement imposed by member states should lead to obligations for patent applicants that they either cannot fulfill or that are unduly burdensome. • To limit transaction costs, the draft included a prohibition against member states requiring patent offices to verify the accuracy of applicants' disclosures.
5	Non-Retroactivity	<ul style="list-style-type: none"> • To maintain legal certainty within the patent system, Article 5 featured a non-retroactivity clause, while recognizing that numerous mandatory disclosure regimes already exist at the national and regional level.
6	Sanctions and Limitations	<ul style="list-style-type: none"> • Whilst Article 6 sought to provide flexibility for states to adopt sanctions and remedies at their discretion, para. 3 set a maximum standard to ensure that states would not revoke or render unenforceable any patents based solely on an applicant's failure to disclose GRATK under the new requirement. This provision sought to ensure legal certainty for patent applicants and facilitate benefit-sharing. • The Text afforded member states the flexibility to revoke or narrow the scope of a patent in exceptional cases, such as when a patent applicant supplied false or fraudulent information.
7	Information Systems	<ul style="list-style-type: none"> • Article 7 complemented the disclosure requirement by supporting the establishment of information systems relating to GRATK.
8	Relationship with Other International Agreements	<ul style="list-style-type: none"> • Article 8 sought to ensure that the instrument is consistent with, and supportive of, existing treaties.
9	Review	<ul style="list-style-type: none"> • Article 9 established a review mechanism for possible extension of the disclosure requirement to other IP areas as well as to derivatives, and for addressing issues arising from new and emerging technologies.

D. Gaining Support for the Chair's Text

The drafting of the Chair's Text concluded in April 2019 and the Text, with helpful explanatory notes for key articles, was subsequently included in the

IGC 40 meeting documents so that it could be considered during the planned stocktaking session.⁹⁴ With the Text ready, the next step was to build a coalition behind it, taking advantage of the momentum established at IGC 36. Even though the Text had the support of most developing countries and some Group B members, it lacked broader support amongst developed countries. Crucially, prior to IGC 40, the EU Commission negotiator, Ms. Krisztina Kovacs, kindly arranged for me to present the Text to EU member states in Brussels. This was a crucial moment in the negotiations, as it resulted in the EU supporting the draft as a basis for further IGC negotiations on GRATK.

Another key moment in my alliance-forming initiative was an invitation from South Africa to attend an informal consultation of the African Group in Pretoria just before IGC 40.⁹⁵ This meeting allowed me to present and discuss the draft Text in an informal setting with key demandeur countries. Whilst there were differences of views on the scope of the draft instrument, it received broad support as the primary negotiating text. Immediately prior to IGC 40, I also conducted informal virtual consultations to further broaden support for the Text.

Thanks in part to my coalition-building efforts, the IGC agreed to include the Chair's Text as a formal IGC working document alongside the "Consolidated Text"⁹⁶ and forward it to the WIPO General Assembly for consideration. The General Assembly endorsed the recommendations of the IGC,⁹⁷ which ensured that the Chair's Text remained on the table for IGC consideration under the new mandate. Importantly, it remained under my control as a Chair's Text, preventing any party from amending it without my consent and avoiding the "unpicking" of the draft during the IGC plenary.

With the Chair's Text formally on the table and no further IGC meetings scheduled until January 2020, I commenced a formal consultation process, including requests for comments.⁹⁸ My objective was to develop a second draft that I hoped would receive support sufficient for it to be moved forward to a diplomatic conference. My consultation plan focused on key groups, member

94. See *Chair's Text*, *supra* note 92.

95. The invitation was kindly facilitated by IGC Vice-Chair, Prof. Yonah Seleti.

96. See *IGC 40 Report*, *supra* note 61, ¶¶ 179–80; see also *GRs Consolidated Text*, *supra* note 65.

97. See WIPO General Assembly, Fifty-First (24th Ordinary) Session, *Report—Adopted by the WIPO General Assembly*, ¶ 226, WIPO Doc. WO/GA/51/18 (Dec. 13, 2019).

98. A complicating factor at this time was Australia's desire for me to discontinue my role as the IGC Chair. From the perspective of the Australian Government, there was little chance of an agreement on GRs, given the significant opposition by industry, particularly the pharmaceutical industry, and several key member states, including the United States, Japan, South Korea, and Canada. I, on the other hand, strongly believed that the dynamics had shifted in the IGC. I subsequently gained Australia's support for my continuation as IGC Chair, subject to my re-election. However, as the work was no longer a key priority for Australia, my contractual support arrangements were significantly impacted.

states, and stakeholders who had been active and influential in the negotiations. My biggest challenge rested with the United States and U.S.-based industry groups, so I decided to engage with them first. Importantly, I wanted to dispel some of the misinformation in the public domain concerning the impact of the proposed regime on selected industries.⁹⁹ I also wanted to highlight the benefits of establishing mandatory disclosure standards at the international level.¹⁰⁰ With the assistance of WIPO, in January 2020, I held consultative meetings with senior staff of the U.S. Patent and Trademark Office and with U.S. industry representatives.¹⁰¹

The meetings in the United States were the last face-to-face consultations I undertook before the onset of the COVID-19 pandemic. Unfortunately, due to the pandemic, WIPO could not convene planned meetings of the IGC. This severely disrupted the IGC's deliberations over the biennium, including consultations on the Chair's Text. However, to maintain the momentum of the negotiations, the IGC Secretariat conducted various virtual activities, including webinars and online commenting sessions, with some of the sessions focusing on the Chair's Text.

With the pandemic extending into 2021, there was a concerning loss of momentum in the GRATK negotiations. In consultation with the IGC Secretariat, I undertook a program of virtual consultations on the Chair's Text. This involved separate meetings with each regional group and the Indigenous Caucus. The purpose of the consultations was to revisit the background and rationale for the Text's key provisions and to provide an update on comments received to date. At these meetings, I also reiterated my intent to issue a second draft of the Chair's Text for consideration by members—a draft that I believed members could consider for final negotiation at a diplomatic conference. My goal was to submit the second draft to the members before the Sixty-Third WIPO General Assembly scheduled for July 2022.

With pandemic conditions improving, in September 2021, the IGC held a hybrid meeting (IGC 41) focused on defining a new IGC mandate for the 2022–23 biennium.¹⁰² Due to the significant impact of the pandemic on the

99. See MARGO A. BAGLEY, OF DISCLOSURE 'STRAWS' AND IP SYSTEMS 'CAMELS': PATENTS, INNOVATION, AND THE DISCLOSURE OF ORIGIN REQUIREMENT, Virginia Pub. L. & Legal Theory Rsch. Paper No. 2016-40, at 4–13 (2016).

100. See generally Joshua D. Sarnoff & Carlos M. Correa, Seventh Conference of the Parties of the Convention on Biological Diversity, *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications*, at viii, UN Pub. UNCTAD/DITC/TED/2005/14 (2006) (summarizing the benefits of mandatory disclosure of origin requirements).

101. From my perspective, the meetings were productive, particularly in addressing industry concerns.

102. See Secretariat, WIPO IGC, Forty-First Session, *Draft Agenda*, WIPO Doc. WIPO/GRTKF/IC/41/1 PROV. 2 (Aug. 9, 2021); WIPO IGC, Forty-First Session, *Report—Adopted by the Committee*, ¶ 52, WIPO Doc. WIPO/GRTKF/IC/41/4 (Mar. 8, 2022).

work of the IGC, members decided that the previous mandate (2020–21) would form the basis for the new mandate.¹⁰³ Members further agreed that the first two meetings in 2022 (IGC 42–43)—both preceding the Sixty-Third WIPO General Assembly—would focus on GRs.¹⁰⁴ My goal was to use the two IGC meetings to achieve a broad consensus on the second draft of the Chair's Text, which would then form a basis for a recommendation by the Sixty-Third WIPO General Assembly to hold a diplomatic conference on GRATK.

E. IGC Chair Removal and Negotiations Derailment

Before the issuance of the second draft of the Chair's Text, however, opponents of my efforts orchestrated my removal from the position of IGC Chair. I use the term “orchestrated” deliberately. From my perspective, the principal motive for the removal was clear—to prevent the convening of a diplomatic conference and forestall further negotiations on GRATK. My ouster was organized despite a clear expectation of most members that I would continue as IGC Chair until I finished my work on the GRATK Text. The circumstances surrounding the nomination of a new Chair were highly unusual in that aside from myself, members proposed no nominees until the last day of the nominations period. Not entirely unexpectedly, the Australian Government advised me at that time that, while it would continue supporting my nomination, it would not provide me with funding.

Unfortunately, with the appointment of a new Chair pending, preparations for IGC 42—the first real IGC negotiating session since 2019—could not commence. To break the deadlock, I proposed that I would continue to serve as Chair for IGC 42–43 and then relinquish my position immediately after IGC 43. With time running out for IGC 42 preparations, the respective Missions agreed that I would Chair only IGC 42, after which a new Chair would take over. The drawback of this arrangement was that the new Chair would manage IGC 43 and oversee the formulation of recommendations on GRATK to the Sixty-Third WIPO General Assembly. Additionally, with my removal as Chair, the status of the Chair's Text became ambiguous.

IGC 42 successfully concluded in a hybrid format with substantive discussions on GRATK.¹⁰⁵ The meeting confirmed the existence of broad support for progressing the Chair's Text as the primary negotiating document. At the conclusion of the meeting, to maintain the momentum around the Chair's Text, I indicated to members that, based on my consultations over the previous two years and discussions at IGC 42, I would submit the second draft of the Chair's Text before IGC 43, scheduled for May 30–June 2, 2022. Fulfilling my

103. See WIPO IGC, *Report—Adopted by the Committee*, *supra* note 102, ¶ 52.

104. See *id.*, Annex II.

105. Unlike previous IGC sessions, however, IGC 42 did not produce a session report.

promise, I submitted the second draft, plus an addendum addressing the key issues that the IGC still had to resolve, as a non-paper for members' consideration at IGC 43.¹⁰⁶

Predictably, following my removal, efforts to move the GRATK negotiations forward faltered. IGC 43 failed to reach consensus on whether the Consolidated Text or the Chair's Text should be the basis for further negotiations on GRATK. Furthermore, IGC 43 failed to produce substantive recommendations to the Sixty-Third WIPO General Assembly, simply providing a factual report.¹⁰⁷ Those wishing to block progress, it seemed, had achieved their goal with my removal.

III. AGREEMENT TO, AND CONVENING OF, THE DIPLOMATIC CONFERENCE (2022–24)

At this critical juncture, geopolitical developments intervened to provide a pathway to a diplomatic conference on GRATK. During the Sixty-Third WIPO General Assembly, fifty-two members put forward a proposal for the provision of technical assistance to the Government of Ukraine, following the country's invasion by Russia in February 2022.¹⁰⁸ When Russia vigorously objected to the proposal, some members suggested it be put to a vote and it was, more than once. While voting on the proposal fell within the WIPO Rules of Procedure, which does not require unanimity,¹⁰⁹ consensus of members is the customary practice. Recognizing the opportunity created by this deviation from custom, the African Group decided to take advantage of the fact that voting was, temporarily at least, now occurring in WIPO and proposed the convening of *two* diplomatic conferences in 2024—one on GRATK (sought by developing countries) and the other on the draft Design Law Treaty (sought by the EU and other high-income countries).¹¹⁰ Importantly, the proposal

106. See Ian Goss (Former Chair of the WIPO IGC), WIPO IGC, Forty-Third Session, *Non-Paper: Amended Draft—International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, WIPO Doc. WIPO/GRTKF/IC/43/NON-PAPER (May 14, 2022) [hereinafter *Chair's Text—Second Draft*].

107. See WIPO IGC, *Decisions of the Forty-Third Session of the Committee—Adopted by the Committee*, at 2–3, WIPO Doc. WIPO/GRTKF/IC/43/DECISIONS (June 3, 2022).

108. See Delegation of Albania et al., Assemblies of the Member States of WIPO, Sixty-Third Series of Meetings, *Proposal on Assistance and Support for Ukraine's Innovation and Creativity Sector and Intellectual Property System*, WIPO Doc. A/63/8 (July 12, 2022).

109. See WIPO RULES OF PROCEDURE, *supra* note 49, at 35.

110. See Africa Group, WIPO General Assembly, Fifty Fifth (30th Extraordinary) Session, *Proposal to Advance WIPO Normative Agenda on the Subjects of Genetic Resources Associated with Traditional Knowledge, and the Design Law Treaty*, WIPO Doc. WO/GA/55/11 (July 20, 2022) [hereinafter *Africa Group, Normative Agenda*]; see also Daren Tang (Director General of WIPO), *Diplomatic Conference to Conclude and Adopt a Design Law Treaty (DLT), Basic Proposal for the Design Law Treaty (DLT)*, WIPO Doc. DLT/DC/3 (May 10, 2024).

established the original Chair's Text as the primary negotiating text for the Diplomatic Conference on GRATK.¹¹¹ To prevent delays in the provision of aid to Ukraine, and to end the voting wave, the WIPO General Assembly adopted the African Group's proposal by consensus.¹¹² Ultimately, after twenty-two years of IGC deliberations, unrelated geopolitical events broke the deadlock in the GRATK negotiations.

A. Preparations

While the WIPO General Assembly had finally agreed on the Diplomatic Conference, including the primary negotiating text, several substantive issues still required negotiation.¹¹³ Additionally, the administrative provisions of the envisioned GRATK instrument needed to be drafted, since the Chair's Text featured only substantive provisions.¹¹⁴ Also, members needed to agree on and adopt the rules of procedure for the Conference. To address these outstanding issues, members conducted a series of informal and formal meetings during 2023. These included regional and cross-regional informal meetings in Uruguay, Indonesia, Algeria, Poland, and China. Two formal meetings in Geneva followed these meetings: (i) a Special IGC session to review the key operative articles in the primary negotiating text,¹¹⁵ and (ii) a Diplomatic Conference Preparatory Meeting to consider the administrative provisions and rules of procedure for the Conference.¹¹⁶

The principal outcome of the Special IGC session was an agreement on changes to the preamble of the Chair's Text and on forwarding the updated Chair's Text as the basic proposal to the Diplomatic Conference Preparatory Meeting.¹¹⁷ The Preparatory Meeting resulted in an agreement on the dates and the draft agenda for the Diplomatic Conference.¹¹⁸ Additionally, an information document reflecting textual proposals submitted by member delegations

111. See Africa Group, *Normative Agenda*, *supra* note 110, Annex, at 1.

112. See WIPO General Assembly, Fifty-Fifth (30th Extraordinary) Session, *Report—Adopted by the WIPO General Assembly*, ¶ 309, WIPO Doc. WO/GA/55/12 (Sept. 30, 2022).

113. See *Chair's Text—Second Draft*, *supra* note 106, pmbl. & arts. 2–3, 6.

114. See *id.*

115. See Secretariat, WIPO IGC, Special Session, *Draft Agenda*, WIPO Doc. WIPO/GRTKF/IC/SS/GE/23/1 Prov. (Apr. 4, 2023); WIPO IGC, Special Session, *Report—adopted by the Committee*, WIPO Doc. WIPO/GRTKF/IC/SS/GE/23/5 (Apr. 16, 2024).

116. See Preparatory Committee of the Diplomatic Conference [hereinafter Preparatory Committee], *Agenda—adopted by the Preparatory Committee*, WIPO Doc. GRATK/PM/1 (Sept. 11, 2023); Secretariat, Preparatory Committee, *Summary Report*, WIPO Doc. GRATK/PM/5 (Sept. 13, 2023).

117. See WIPO IGC, Special Session, *Decisions—Adopted by the Committee*, at 2, WIPO Doc. WIPO/GRTKF/IC/SS/GE/23/4 (Sept. 8, 2023).

118. See Director General, Preparatory Committee, *Agenda, Dates and Venue of the Diplomatic Conference*, at 2–3, WIPO Doc. GRATK/PM/6 (Nov. 29, 2023).

concerning the draft administrative provisions and final clauses was produced for consideration at the Diplomatic Conference.¹¹⁹

The importance of the above meetings in preparing delegates for the Diplomatic Conference should not be underestimated. Though disagreements remained about some of the substantive articles, the meetings provided an invaluable opportunity to develop a shared understanding of members' and stakeholders' different policy perspectives. This was critical considering the delay caused by the COVID-19 pandemic. The final meeting before the Diplomatic Conference was an informal cross-regional meeting held in Namibia. Although not all members attended, it provided an opportunity to build relationships among key delegates—relationships that would be critical to resolving important issues during the Conference.¹²⁰

One outstanding issue was the location of the Diplomatic Conference. It is usual for a member state to host a Diplomatic Conference. Unfortunately, several members who had indicated an interest in hosting the Conference could not do so due to their election cycle. As a result, the Preparatory Committee approved the Conference to be held at WIPO headquarters in Geneva.¹²¹ This posed some risks, as there was no host nation to champion the Conference and drive its proceedings to a successful conclusion.

In addition, organizing the event in Geneva put a greater burden on officers elected to manage the Conference, in particular the President of the Diplomatic Conference and Presidents of its two main Committees—Committee I, responsible for chairing negotiations on the substantive provisions of the basic proposal; and Committee II, responsible for chairing negotiations on the administrative provisions.¹²² Fortunately, Brazil provided a highly experienced diplomat¹²³ to lead the negotiations supported by experienced officials from Australia and Nigeria to manage Committees I and II.¹²⁴ These were the individuals who ultimately brought 25 years of negotiations to a conclusion.

119. See Secretariat, Preparatory Committee, *Draft Administrative Provisions and Final Clauses for the Instrument to be Considered by the Diplomatic Conference*, WIPO Doc. GRATK/PM/2 (July 10, 2023).

120. These meetings placed a significant burden on the IGC Secretariat, and I commend the Secretariat staff for their efforts in planning and coordinating these meetings.

121. See Preparatory Committee, *Report—Adopted by the Preparatory Committee*, ¶ 298(ii), WIPO Doc. GRATK/PM/7 (Apr. 12, 2024).

122. See Diplomatic Conference, *Rules of Procedure of the Diplomatic Conference*, ¶ 12(1), WIPO Doc. GRATK/DC/2 (May 13, 2024); see also Diplomatic Conference, *Officers and Committees*, at 3–4, WIPO Doc. GRATK/DC/INF/3 (May 13, 2024) (listing the officers of Main Committee I and Main Committee II). The Presidents of Committees I and II were assisted by Regional Coordinators in leading the negotiations.

123. Amb. Guilherme de Aguiar Patriota. Diplomatic Conference, *Officers and Committees*, *supra* note 122, at 2.

124. *Id.* at 3–4.

B. Resolution of Outstanding Issues

The Diplomatic Conference took place from May 13 to May 24, 2024.¹²⁵ During the initial days of the Conference, member states predictably spent a significant amount of time on reiterating their well-established positions. This attitude shifted as the Conference entered its second week, when delegates, assisted by the firm hand of the President of Committee I,¹²⁶ switched gears and commenced substantive negotiations. Once substantive negotiations commenced, members quickly resolved most issues relating to the primary articles (1–9).¹²⁷ This suggested that the significant preparatory work prior to the Conference undertaken by the IGC Secretariat had borne fruit. Additionally, the President of Committee I established clear negotiating boundaries, ensuring that delegates remained focused on the substantive unresolved issues.

The Diplomatic Conference addressed the two most contentious issues—the trigger language and establishing a maximum standard for sanctions—in its final days.¹²⁸ The challenge was to reconcile different policy perspectives on (i) the scope of the trigger, (ii) patent revocation as a penalty for non-disclosure, and (iii) how to provide sufficient policy space in these areas for existing regional and national disclosure regimes. Ultimately, the original language of the substantive articles (1–9) changed little, except in these key areas.¹²⁹ However, the changes did not alter the fundamental balance of the original text, confirming that the Chair's Text had achieved its core objective of reflecting the interests of both the holders and users of GRATK.

The most challenging negotiations during the Conference concerned administrative provisions of the Treaty, particularly the membership and administration of the Assembly and subsequent revisions of the Treaty.¹³⁰ This was not a surprise, as similar to the IGC, process is a proxy for a lack of trust amongst delegates. Ultimately, in the early morning of the last day of the Diplomatic Conference, members agreed on the final two outstanding issues—revision of the Treaty and the number of signatories for the instrument to enter into

125. See Secretariat, Diplomatic Conference, *Revised Draft Agenda*, WIPO Doc. GRATK/DC/1 PROV. 3 (May 10, 2024); Secretariat, Diplomatic Conference, *Revised Tentative Timetable for the Diplomatic Conference*, WIPO Doc. GRATK/DC/INF/2 REV. (May 18, 2024).

126. Ms. Jodie McAlister of Australia served as the President of Committee I. See Diplomatic Conference, *Officers and Committees*, *supra* note 122, at 3.

127. See Secretariat, Diplomatic Conference, *Basic Proposal for an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, arts. 1–9, WIPO Doc. GRATK/DC/3 (Dec. 14, 2023) [hereinafter *Treaty Proposal*].

128. See *id.* arts. 3.1–2, 6.

129. Compare Treaty, *supra* note 8, arts. 3.1–2, 5 with *Treaty Proposal*, *supra* note 127, arts. 3.1–2, 6.

130. See *Treaty Proposal*, *supra* note 127, arts. 11 & 15.

force.¹³¹ The President of the Diplomatic Conference resolved these issues by putting forward a compromise proposal based on the Vienna Convention on the Law of Treaties.¹³²

An important issue that permeated the Diplomatic Conference negotiations was the role of Indigenous Peoples in the Treaty Assembly.¹³³ Even though Indigenous Peoples are holders of GRATK, they are not recognized as contracting parties.¹³⁴ At the same time, they have special observer status within the IGC that recognizes their rights and interests as set forth in the UNDRIP.¹³⁵ Most member states wanted to replicate this status within the Treaty Assembly. However, there was also the issue of how to address the role of Local Communities. Ultimately, members reached a compromise by including both stakeholder groups within the Assembly but without voting rights.¹³⁶

IV. LESSONS LEARNED LEADING IGC NEGOTIATIONS

The role of chairing multilateral negotiations comprises two key functions: (i) establishing a negotiating environment that facilitates consensus-building, and (ii) leading and championing negotiating processes toward a fruitful conclusion.¹³⁷ In this Part, I provide guidance on how to succeed in these two functional areas, based on the experiences I gained during my engagement at the IGC in the period from 2009 to 2024 and, especially, during my six-year tenure (2016–22) as IGC Chair.

A. *Effective Leadership: The Catalyst of Compromise*

A fundamental prerequisite to successfully steering multilateral talks to the finish line is competent leadership. Leadership is a relationship-centered activity focused on motivating others to achieve a specific outcome.¹³⁸ A good leader needs, most notably, strong communication and people skills,

131. Compare Treaty, *supra* note 8, arts. 14, 17 with Treaty Proposal, *supra* note 127, arts. 15, 18.

132. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

133. See Treaty, *supra* note 8, art. 10.

134. See *id.*, art. 12.

135. See generally *Indigenous Peoples and Local Communities' Engagement*, WIPO, <https://www.wipo.int/web/traditional-knowledge/engagement> [<https://perma.cc/5SLA-YBYA>] (outlining IPLC's engagement at the IGC); see also UNDRIP, *supra* note 35, pmbl. & arts. 1–37.

136. See Treaty, *supra* note 8, art. 10.1(c).

137. See, e.g., *Substantive Role of the Chair*, UNITED NATIONS, <https://www.un.org/en/model-united-nations/substantive-role-chair> [<https://perma.cc/9QLR-Q33F>].

138. See generally JAMES MACGREGOR BURNS, LEADERSHIP 1–35 (1978) (defining leadership as a relational and moral process).

emotional intelligence, impartiality, and a clear view of the goal or outcome to be achieved.¹³⁹ In the context of international negotiations, an additional precondition for success is cultural sensitivity.¹⁴⁰ Ultimately, leadership depends on gaining the trust of delegates, which is hard to acquire and easy to lose. In brief, the principal elements of the leadership methodology I adopted during my tenure as IGC Chair included the following:

- (1) **Teamwork and inclusiveness.** The key to my success as IGC Chair was the support of a strong, diverse team, which included the IGC Vice-Chairs,¹⁴¹ the “Friend of The Chair,”¹⁴² and the staff of the IGC Secretariat. Important adjuncts to my core team were Regional Coordinators, who provided a vital conduit for communication with member states across the regional groupings. Critically, all members of my team, as well as the Regional Coordinators, were always open and honest in their views, provided sound advice, and remained focused notwithstanding their respective group’s negotiating positions.
- (2) **Leadership style.** As Chair, it was essential to establish a leadership style that promoted respect and built trust among a large and diverse group of member states. My approach was to be firm, fair, but friendly, while setting clear expectations for how I would approach the role and, importantly, my expectations of delegates.
- (3) **Knowledge of subject matter.** A solid understanding of the issues under discussion allows an IGC Chair to navigate complex legal and technical aspects of the negotiations, identify core interests, anticipate challenges, and propose viable solutions. Accordingly, throughout my engagement at the IGC, I made sure I understood the subject matter being negotiated at both the broad policy level as well as the narrow technical level. This does not suggest that I was an expert on all issues, particularly in complex legal and technology-intensive areas. However, I had sufficient knowledge of the relevant topics to be able to address, question, and shape discussions in real time from the podium or when chairing informal meetings.

139. See, e.g., PETER G. NORTHOUSE, *LEADERSHIP: THEORY AND PRACTICE* 27–56 (9th ed. 2021) (highlighting key traits associated with successful leadership).

140. See, e.g., GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* 412–16 (3d ed. 2010) (discussing intercultural encounters in international politics and inter-governmental organizations).

141. During my chairmanship, IGC Vice-Chairs included Prof. Yonah Seleti, Mr. Jukka Lieder, and Amb. Robert Tene.

142. My “Friend of the Chair” was Prof. Margo Bagley, Asa Griggs Candler Professor of Law, Emory University School of Law.

- (4) **Planning and preparation.** While formal IGC meetings only last a few days, significantly more time is spent preparing for them. Unsurprisingly, then, preparations for IGC meetings consumed a significant amount of my time throughout each biennium. While the IGC Secretariat carried out much of the preparatory work, I remained responsible for, most notably, setting the agenda, modalities, and approach for the negotiations, including identifying key issues to be negotiated. In addition, I had to review the status of the negotiations, undertake informal consultations,¹⁴³ formulate approaches to meetings (including processes and overall negotiating strategy), oversee the development of non-papers, and conduct pre-meeting briefings with the IGC Bureau¹⁴⁴ and Regional Coordinators. Clearly, to be successful, a Chair needs to commit a significant amount of time to preparatory work.¹⁴⁵
- (5) **Communication.** Effective communication is crucial in international negotiations, as it fosters mutual understanding, facilitates consensus-building, and ensures that agreements are transparent and sustainable. By always maintaining open dialogue with member states and stakeholders, I was able to manage conflicts, align diverging priorities, and create an environment conducive to achieving consensus on key issues.
- (6) **Optimism.** International negotiations are lengthy and challenging, with member state delegations often struggling to reach consensus. Optimism is vital in leading negotiations, as it inspires confidence, fosters collaboration, and sustains momentum in difficult situations. By always “keeping the faith,” I was able to maintain a constructive atmosphere and motivate parties to stay engaged, view obstacles as opportunities, and work towards value-adding outcomes.

B. Bridging Divides: Pathways to Compromise on Key Issues

A key function of a Chair in multilateral negotiations is to identify pathways toward reconciling divergent negotiating objectives and to channel member states toward an acceptable compromise.¹⁴⁶ My approach to resolving differences and finding consensus on critical issues included several steps. The first step

143. These included consultations with the IGC Secretariat, IGC Vice-Chairs, the “Friend of the Chair,” and Regional Coordinators, as well as key thought leaders and influencers within regional groups and amongst observers, particularly the Indigenous Caucus.

144. The IGC Bureau comprises the IGC Chair and Vice-Chairs, and the IGC Secretariat.

145. Fortunately, I retired prior to becoming an IGC Chair, which allowed me to work almost full-time for the IGC on a pro-bono basis.

146. Broadly speaking, the primary objectives of member states in IGC negotiations have included one of the following: (i) maintaining the status quo (that is, no change to the international IP system); (ii) introducing new *sui generis* regimes for the protection of GRs, TK, and TCEs; or (iii) protecting genetic and cultural assets within existing IP systems.

was a thorough analysis, the goal of which was to identify and assess the core policy issues and interests involved. The analysis was followed by consultations with key representatives of member states and relevant stakeholder groups with the view of ascertaining and evaluating their key negotiating positions and red lines. Based on the outcomes of the policy analysis and consultations, I then proceeded to craft a strategy for progressing the negotiations toward a specific end goal.

While the consensus-building strategies I implemented during my tenure as IGC Chair varied depending on the concrete issue under discussion, they all sought to:

- (1) Establish a positive environment and processes to facilitate a shared understanding of the members' divergent positions;
- (2) Promote an incremental approach that prioritizes negotiations on topics in which the degree of consensus among member states is the highest (as opposed to seeking consensus across all negotiating topics in parallel);
- (3) Formulate textual proposals as foundational drafts that can be further enhanced and built upon over time, rather than attempting to immediately provide a comprehensive solution; and
- (4) Build a coalition behind each proposal through an engagement strategy designed to (i) secure the agreement of key regional groups, thought leaders, influential member states, and observers and (ii) isolate the states blocking progress.

Furthermore, I sought to craft negotiating processes in a way that reflects the status and maturity of the negotiations and made sure that members informally agreed on relevant procedures prior to the commencement of meetings and negotiating sessions. This ensured that we did not waste negotiating time on procedure-related discussions. Pre-meetings with Regional Coordinators and informal discussions with members of the IGC Bureau and key thought leaders across the regional groups were particularly important in this regard. In addition, I always sought to ensure transparency and inclusiveness in all negotiating processes. This was challenging at times, as delegates' views of transparency and inclusiveness varied greatly depending on their negotiating objectives and strategies.¹⁴⁷

147. Many delegates consider the IGC plenary as the most inclusive and transparent environment. However, the plenary is not always an effective negotiating forum due to the large number of delegates present and because delegates' primary focus during plenary sessions tends to be on ensuring that their national positions are recorded. Also, delegates often limit their presentations to declaring support for a preexisting proposal and refrain from engaging in substantive discussions. For negotiations to be productive within the plenary, the Chair needs to shape the discussions and proactively promote exchange between delegates with different views.

V. THE WAY FORWARD FOR IGC NEGOTIATIONS ON TK AND TCEs

A. *The Root Cause of Discord: Conflicting Paradigms*

The ongoing negotiations on TK and TCEs are significantly more challenging and broader in scope than the recently concluded talks on GRATK. Driving them to the finish line will require a sustained effort by IGC leadership, member states, and stakeholders. Before discussing the way forward for future IGC negotiations, I would like to highlight what I believe is the central issue impeding member states from achieving consensus in the TK and TCE talks. This is the deep divide between the IPLCs' view of the world—a paradigm based on respect for nature, spirituality, collectivism, oral traditions, and informality—and the concepts that underpin the traditional (Western) IP system, including individual ownership, exclusive rights, Lockean labor theory of property, and legal formalism.¹⁴⁸ Due to historical circumstances, IPLCs continue to live in two different worlds, while maintaining their unique aspirations and expectations for reconciliation and recognition. As captured in the *Uluru Statement from the Heart*—an appeal to the Australian people from First Nations Australians:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. . . .

We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.¹⁴⁹

148. See, e.g., Jaris Swidrovich, *Tensions between Western and Indigenous worldviews in pharmacy education and practice: Part I*, 156 CAN. J. PHAR. 177, 177–80 (2023) (highlighting the differences between Indigenous and Western worldviews).

149. Statement, Uluru Dialogue, Uluru Statement from the Heart, ¶ 7 (First Nations Nat'l Constitutional Convention, May 26, 2017), <https://ulurustatement.org/the-statement/view-the-statement/> [<https://perma.cc/4JGF-EXGU>] (emphasis in original).

Unsurprisingly, the deep cultural and conceptual rift between the IPLCs' and Western value systems has played a pivotal role in the ongoing discussions on TK and TCEs. As reflected in the current versions of the negotiating texts,¹⁵⁰ member states have struggled to agree both on the objectives of the proposed instruments and on the application of key concepts that play a central role in traditional IP systems, including originality, fixation, ownership, and scope of protection.¹⁵¹ The proposals for reconciling differences on key issues that have been put forward by member states and observers over the years have reflected two principal approaches—(i) a *sui generis* rights-based approach and (ii) a measures-based approach within the existing IP system.¹⁵² With some exceptions, IPLCs and developing countries prefer the *sui generis* option, while most developed countries seek to accommodate TK and TCEs within traditional IP regimes.¹⁵³ The resolution of this fundamental disagreement remains pending.

B. The Preferred Option: A Single Sui Generis Framework for Both TK and TCEs

In my view, the burdens of accommodating IPLCs' legitimate interests in relation to TK and TCEs within the existing IP system outweigh the benefits, and the optimal way forward is the *sui generis* rights-based avenue, noting that such an approach will incorporate measures particularly in relation to defensive protection. It is critical for member states to finally recognize this point and proceed to negotiate using the *sui generis* approach, as opposed to the ongoing practice of using both the rights-based and measures-based approaches in parallel. Additionally, I believe that addressing the protection of TK and TCEs in two separate negotiating tracks leading to two distinct instruments is counterproductive and fails to reflect the intrinsic link between the two subject matter areas. After all, TCEs express IPLCs' TK.¹⁵⁴ It would be prudent to eliminate the artificial divide and merge the two negotiating processes into a single-track culminating in one consolidated instrument covering both subject matter areas.

150. See Secretariat, WIPO IGC, Forty-Ninth Session, *The Protection of Traditional Knowledge: Draft Articles*, WIPO Doc. WIPO/GRTKF/IC/49/4 (Oct. 4, 2024) [hereinafter *TK Negotiating Text*]; Secretariat, WIPO IGC, Forty-Ninth Session, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO Doc. WIPO/GRTKF/IC/49/5 (Oct. 4, 2024) [hereinafter *TCEs Negotiating Text*].

151. See *TK Negotiating Text*, *supra* note 150, pmbl. & arts. 1–5; *TCEs Negotiating Text*, *supra* note 150, pmbl. & arts. 1–5.

152. See *supra* notes 54 & 56.

153. See *supra* notes 53 & 55.

154. See, e.g., WIPO, Intellectual Property and Traditional Cultural Expressions/Folklore 5–6, WIPO Pub. No. 913(E) (2005), https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf [<https://perma.cc/52W3-AWT6>].

Naturally, future discussions on the consolidated (TK and TCEs) text should appropriately reflect the negotiations that have taken place to date. At the same time, member states should refrain from “enhancing” the existing negotiating texts, which are already convoluted,¹⁵⁵ with additional textual options and should instead start afresh with a draft that incorporates selected provisions of the current drafts. In the initial phase, the focus should be on the provisions delineating the scope of the future instrument, including those that set forth the objectives of the agreement and define the subject matter, eligibility criteria, beneficiaries, scope of protection, and exceptions and limitations (“E&Ls”). Once member states agree on these core elements, other substantive elements of the future instrument will, in my opinion, not be difficult to negotiate. Importantly, as evident from Table 3 below, member states have made considerable progress in agreeing on some core elements in the negotiations that have taken place to date. However, many vital issues remain unresolved.

Table 3: Current Status of Negotiations on Core Provisions

Provision/ Area	Status of Negotiations
Objectives	<ul style="list-style-type: none"> Both negotiating texts currently contain four alternative versions of the draft “Objectives” provision, with each version setting forth different goals for the instruments (with some overlap).¹⁵⁶
Subject matter	<ul style="list-style-type: none"> Member states are close to agreeing on the definition of both TK and TCEs.¹⁵⁷ This is a significant achievement, considering other U.N. bodies have failed to do so.

155. See *TK Negotiating Text*, *supra* note 150, arts. 1–5; *TCEs Negotiating Text*, *supra* note 150, arts. 1–5.

156. The objectives listed in the current drafts include, but are not limited to, the following:

- To “provide effective and adequate protection” of TK or TCEs;
- To “prevent the erroneous grant of [IP] rights” over TK or TCEs;
- To “provide effective, balanced and adequate protection relating to [IP] against unauthorized and/or uncompensated uses” of TK or TCEs;
- To “encourage and protect creation and innovation, whether or not commercialized, recognizing the value of public domain and the need to protect, preserve and enhance the public domain;” and
- To “recognize [IPLCs] as holders” of TK or TCEs.

TK Negotiating Text, *supra* note 150, art. 2; *TCEs Negotiating Text*, *supra* note 150, art. 2.

157. The definitions included in the current negotiating texts are as follows:

- TK—“knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that is dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how,

Provision/ Area	Status of Negotiations
Eligibility criteria	<ul style="list-style-type: none"> • The TK negotiating text sets forth four alternative versions of a provision defining subject matter eligibility criteria, while the TCEs negotiating text includes three alternative versions.¹⁵⁸ • While there is substantial agreement among members on the principal criteria for protection,¹⁵⁹ there is discord over whether member states should be allowed to specify additional criteria for protection in their domestic legislation or condition protection on the prior existence of TK or TCE for a specific period.¹⁶⁰
Beneficiaries	<ul style="list-style-type: none"> • Both negotiating texts include two versions of the provision defining the beneficiaries of protection.¹⁶¹ • Both versions specify IPLCs as the beneficiaries of protection,¹⁶² but one of the TK proposals narrows down the beneficiaries to IPLCs who “hold” “protected” TK and, similarly, one of the TCEs proposals limits beneficiaries to IPLCs who “hold, express, create, maintain, use, and develop” TCEs.¹⁶³ • One of the two versions allows member states to specify other beneficiaries who create TK or TCEs in their domestic legislation.¹⁶⁴

skills, innovations, practices, teaching, or learning.” *TK Negotiating Text*, *supra* note 150, art. 1 (brackets in original).

- b) TCEs—“any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and [may be]/[is] dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.” *TCEs Negotiating Text*, *supra* note 150, art. 1 (brackets in original).

158. See *TK Negotiating Text*, *supra* note 150, art. 3; *TCEs Negotiating Text*, *supra* note 150, art. 3.

159. See *TK Negotiating Text*, *supra* note 150, arts. 3.1(a)–(c) (“Facilitators’ Alternative”), 3.1(a)–(c) (“Alt 1”), 3(a)–(c) (“Alt 2”) & 3(a)–(b) (“Alternative ARTICLE 3”); *TCEs Negotiating Text*, *supra* note 150, arts. 3.1(a)–(c) (“Facilitators’ Alternative”), 3.1(a)–(c) (“Alt 1”) & 3.1(a)–(c) (“Alt 2”).

160. See *TK Negotiating Text*, *supra* note 150, arts. 3.2 (“Facilitators’ Alternative”), 3.2 (“Alt 1”) & 3.2 (“Alt 2”); *TCEs Negotiating Text*, *supra* note 150, arts. 3.2 (“Facilitators’ Alternative”) & 3.2 (“Alt 1”).

161. See *TK Negotiating Text*, *supra* note 150, art. 4; *TCEs Negotiating Text*, *supra* note 150, art. 4.

162. See *TK Negotiating Text*, *supra* note 150, arts. 4 (“Alt 1”) & 4.1 (“Facilitators’ Alternative”); *TCEs Negotiating Text*, *supra* note 150, arts. 4 (“Alt 1”) & 4.1 (“Facilitators’ Alternative”).

163. See *TK Negotiating Text*, *supra* note 150, art. 4 (“Alt 1”); *TCEs Negotiating Text*, *supra* note 150, art. 4 (“Alt”).

164. See *TK Negotiating Text*, *supra* note 150, art. 4.2 (“Facilitators’ Alternative”); *TCEs Negotiating Text*, *supra* note 150, art. 4.2 (“Facilitators’ Alternative”).

Provision/ Area	Status of Negotiations
Scope of protection	<ul style="list-style-type: none"> • The scope of protection remains the most contentious core issue in both the TK and TCEs negotiations. • Both negotiating texts currently include four versions of the provision defining the scope of protection.¹⁶⁵ • In addition to economic rights, two of the four draft provisions in the TK text, and all four provisions in the TCEs text, grant beneficiaries' moral rights.¹⁶⁶ • As previously noted, to move the negotiations forward, the IGC has been considering a tiered approach to protection.¹⁶⁷
E&Ls	<ul style="list-style-type: none"> • There are significant differences among member states and stakeholders regarding the scope of permissible E&Ls. • The TK draft contains three version of the provision defining E&Ls, while the TCEs text includes four.¹⁶⁸ • In general, IPLCs and developing countries prefer narrow E&Ls, while developed countries and copyright industries prefer broad E&Ls.

C. Strategies for Moving the TK and TCEs Negotiations Forward

As indicated above, the current convoluted, dual-track approach to the TK and TCEs negotiations is unlikely to result in a meaningful negotiating outcome in the form of binding international norms for the protection of IPLCs' knowledge and cultural assets. In what follows, I provide several recommendations on how to channel the ongoing IGC talks in a more productive direction.

1. Issuance of a Non-Binding Declaratory Statement

In my opinion, the IGC should expeditiously proceed with the drafting and publication of a declaratory statement setting forth the objectives and principles that member states commit to in relation to the protection of genetic and cultural resources. While such a statement would not be binding on members, it would refocus and guide future substantive negotiations on TK and TCEs. Building on the momentum of the recently concluded Treaty, it would also

165. See *TK Negotiating Text*, *supra* note 150, art. 5; *TCEs Negotiating Text*, *supra* note 150, art. 5.

166. See *TK Negotiating Text*, *supra* note 150, arts. 5 ("Facilitators' Alternative") & 5.1 ("Alt 1"); *TCEs Negotiating Text*, *supra* note 150, arts. 5 ("Facilitators' Alternative"), 5.1 ("Alt 1"), 5.1 ("Alt 2") & 5.1–3 ("Alt 3").

167. See *supra* note 57.

168. See *TK Negotiating Text*, *supra* note 150, art. 9; *TCEs Negotiating Text*, *supra* note 150, art. 7.

reinforce member states' commitment to delivering an outcome on TK and TCEs and build trust within the IGC and WIPO more generally. The content of the statement should appropriately reflect the provisions of the recent Treaty as well as of the TK and TCEs negotiating texts. The draft of the statement should be prepared by a working group of experts selected by member states based on the terms of reference agreed upon by the membership.

2. *Merger of the TK and TCEs Negotiating Tracks*

In parallel with the formulation of the aforementioned declaratory statement, the IGC should merge the TK and TCEs negotiating tracks and proceed with the development of a single negotiating text that reflects the close link between TK and TCEs. In the initial phase, the IGC should focus on the core issues outlined in Section V.B. above—objectives, subject matter, eligibility criteria, beneficiaries, scope of protection, and E&Ls.¹⁶⁹ The IGC has at least the following three options to develop this consolidated instrument: (i) informal meetings or contact groups supported by facilitators; (ii) an expert working group; or (iii) a Chair's text. Several expert working groups should ideally support the development of the consolidated text. The groups would address specific negotiating issues—such as the definition of beneficiaries, scope of protection, and E&Ls—and make recommendations to the plenary. In addition, the IGC Secretariat should produce reports or studies on non-normative issues, such as defensive measures and databases, for member states' consideration. Furthermore, the WIPO Traditional Knowledge Division ("TKD") has a wealth of experience and knowledge related to TK and TCEs, which should be suitably utilized to complete additional studies and reports to support the negotiating process.

3. *Closer Involvement of IPLCs in the Negotiating Process*

As the primary stewards of TK and TCEs,¹⁷⁰ IPLCs should play a focal role in the IGC's negotiations going forward. Positioning IPLCs at the center of the negotiating process should contribute to the overcoming of cultural divides and the development of a shared understanding, which is essential for developing consensus positions on key issues. It would also ensure that any norms for the protection of TK and TCEs that member states ultimately adopt are meaningful, equitable, and enduring. To facilitate the focalization of IPLCs in negotiating processes, the IGC should organize as many future meetings as practicable in member states with significant IPLC presence, including both developed

169. See discussion *supra* Section V.B.

170. See, e.g., WORLD WIDE FUND FOR NATURE (WWF) ET AL., THE STATE OF INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' LANDS AND TERRITORIES 32 (2021) ("IPLCs are custodians of over a third of the world's most important places for biodiversity.").

and developing countries. These meetings should ideally include IPLC-focused workshops and cultural visits managed by the host nation. In addition, the IGC Secretariat together with the TKD should produce educational materials to enhance understanding among member states, key stakeholder groups, and the public of the IPLCs' value systems, principal needs in relation to TK and TCEs, and negotiating objectives. A series of visibility and sensitization events—both physical and virtual—in which IPLCs take center stage should accompany the preparation of these materials.¹⁷¹

4. *Enhancement of IGC Leadership*

The outcome of the TK and TCEs negotiations will depend in significant part on the characteristics and quality of the IGC's leadership. We must therefore give careful thought to the structure and composition of the IGC's management organs. A particularly important consideration in this regard is diversity. IGC's leadership must comprise a diverse group of individuals who represent the various regional policy interests playing a key role in the negotiations. The leadership should also possess appropriate policy and diplomatic experience, ensuring a close link with political and diplomatic channels in Geneva. Ideally, the IGC's top echelon (Chair and Vice-Chairs) should feature a senior policy officer and a diplomat at the Ambassador or Deputy Ambassador level. Fundamentally, the IGC Chair and Vice-Chairs should not only have ample leadership skills but also the time to move the negotiations forward. IGC leaders should have the availability to work full-time for the IGC on an ongoing basis, not only immediately before and during meetings. The IGC may also want to consider hiring a full-time special rapporteur or expert to support the Chair and Vice Chairs. The individual would need to have the appropriate gravitas and respect of the members. Alternatively, the Chair should consider retaining the position of "Friend of the Chair."

CONCLUSION

The adoption of the Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge in May 2024 represents a significant and promising development in the evolution of the international IP system. It is not only the first WIPO treaty instigated by the Global South, but also the first WIPO instrument explicitly acknowledging the aspirations and interests of IPLCs in relation to their genetic, knowledge, and cultural assets.

171. Of course, heightened involvement of IPLCs might also lead to calls for increased involvement of industry stakeholders, to be able to effectively articulate how IPLC demands might affect their needs for legal certainty, particularly in relation to unregistered cultural resources.

The Treaty demonstrates what we can achieve even in a fractured multilateral environment, against significant odds, if we keep the faith and have courageous leaders driving change.

With the conclusion of the GRATK negotiations, the IGC can now dedicate its full attention to the ongoing negotiations on TK and TCEs. These negotiations present significant challenges for WIPO member states both in terms of their overall objectives, as well as in the delineation of the concrete norms that will define a new system for the global protection of TK and TCEs. Hopefully, leveraging the insights presented in this Article, the IGC will soon be able to overcome all challenges and drive the negotiations to a fruitful conclusion in the form of an equitable accord that will fully address IPLCs' outstanding concerns in relation to their knowledge and cultural assets.