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Developing an Indigenized Limitations and Exceptions Framework within the Global Intellectual Property System

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A key issue in international intellectual property ("IP") negotiations for protecting Indigenous interests in genetic resources, traditional knowledge, and cultural expression is the integration of the framework of limitations and exceptions ("L&Es"). This framework allows certain acts that would otherwise infringe on IP rights and protection, limiting the scope of exclusive rights and legal protection for rightsholders to create a balanced IP system. However, L&Es can undermine Indigenous rights if applied without sensitivity to the cultural, spiritual, and economic interests of Indigenous people. This Article argues for an Indigenized L&Es framework, which may necessitate excluding L&Es in certain legal instruments. The 2024 World Intellectual Property Organization Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, which omits L&Es, is cited as a positive example. While L&Es may be appropriate in other contexts, such as proposed treaties on traditional knowledge and cultural expressions, they must be developed and implemented with meaningful Indigenous participation to avoid harmful impacts and must respect Indigenous knowledge governance frameworks.

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Introduction

The legal protection of genetic resources ("GRs"), traditional knowledge ("TK"), and traditional cultural expressions ("TCEs")[1] raises complex questions on the governance of knowledge that have significant implications for the rights of Indigenous peoples and local communities.[2] A key issue at the World Intellectual Property Organization ("WIPO") negotiations for the legal protection of GR, TK, and TCEs is the perceived need to define rights and protections to

1. Genetic resources, in the context of Indigenous rights, are "genetic material of actual or potential value," where genetic material means "any material of plant, animal, microbial or other origin containing functional units of heredity" (i.e., genes). Convention on Biological Diversity art. 2, June 5, 1992, 1760 U.N.T.S. 79. The "traditional knowledge (TK) of Indigenous people and local communities encompasses both tangible and intangible resources, includes knowledge embodied in innovations, and is reflected in cultural practices, know-how, and skills. Traditional Cultural Expressions (TCEs) are an extension of TK that exist in communicative forms such as music, folklore, dance, language, and literature." Ruth L. Okediji, *Grafting Traditional Knowledge onto a Common Law System*, 110 Geo. L.J. 75, 76–77 (2021); *see also* William Fisher, *Why Is Traditional Knowledge Different from All Other Intellectual Property?*, 58 Washburn L.J. 365, 365 (2019) ("Traditional knowledge may be defined as understanding or skill developed and preserved by the members of an [I]ndigenous group, concerning either socially beneficial uses of natural resources (such as plants, animals, or components thereof) or cultural practices (such as rituals, narratives, poems, images, designs, clothing, fabrics, music, or dances)."). This Article sometimes uses the term traditional knowledge ("TK"). In such instances, it encompasses traditional cultural expressions ("TCEs").

2. In this Article, the terms Indigenous peoples, Indigenous groups, or Indigenous communities are used interchangeably to encompass all people groups included in the World Intellectual Property Organization ("WIPO") term "Indigenous peoples and local communities." World Intellectual Property Organization [hereinafter WIPO], The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Background Brief No. 2, at 2–3, WIPO Ref. RN2023-5.2EN (2024) [hereinafter Background Brief No. 2], https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-2-en-the-wipo-intergovernmental-committee-on-intellectual-property-and-genetic-resources-traditional-knowledge-and-folklore.pdf [https://perma.cc/G75U-W9WQ] .

align with the conventional intellectual property ("IP") framework of limitations and exceptions ("L&Es").[3]

L&Es operate as a mechanism for sanctioning certain acts that would otherwise contravene the rights and entitlements of an IP rightsholder, effectively limiting the scope of exclusive rights and protection that may be claimed.[4] L&Es typically allow free access and use of IP-protected material without informing or obtaining consent from rightsholders, though some require payment to rightsholders.[5] L&Es, therefore, limit the reach of exclusive rights. The framework of L&Es, especially in the context of copyright and patent, serves as IP's prevailing structure for knowledge access governance. Limiting IP monopoly over access and use through the framework of L&Es has been justified based on a competing public interest in accessing and using IP-protected goods on less restrictive terms.[6] The mechanism of L&Es represents a public interest balancing tool within the overall IP framework.

Provisions creating L&Es on IP rights often result from discussions at national and international IP forums about whether exclusive rights should be limited for public interest purposes.[7] While using L&Es as a balancing framework in IP laws predates the globalization of IP protection through multilateral treaties, the scope of L&Es in national IP laws is now largely

3. *See* Secretariat, WIPO General Assembly, Fifty-Sixth (26th Ordinary) Session, *Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, at 2, ¶ (b), n.1, WIPO Doc. WO/GA/56/10 (June 19, 2023) [hereinafter *IGC Mandate 2024–2025*] (identifying the issue of limitations and exceptions as a contentious issue that must be focused on for resolution).

4. Daniel J. Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, 5 U. Ottawa L. & Tech. J. 1, 4 (2008).

5. Pamela Samuelson, *Justification for Copyright Limitations and Exceptions*, *in* Copyright Law in an Age of Limitations and Exceptions 12, 13 (Ruth L. Okediji ed., 2017); Jane C. Ginsburg, *Fair Use for Free, or Permitted-But-Paid*, 29 Berkeley Tech. L.J. 1383, 1385–86 (2014).

6. *See generally* Ruth L. Okediji, U.N. Conference on Trade and Development & International Centre for Trade and Sustainable Development, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, UNCTAD—ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 15 (2006).

7. Samuelson, *supra* note 5, at 13. See, for example, the Marrakesh VIP Treaty, which contains a set of limitations and exceptions ("L&Es") and was a product of years of deliberations at WIPO. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013–June 27, 2014, 3162 U.N.T.S. 3, WIPO Doc. TRT/MARRAKESH/001 [hereinafter Marrakesh VIP Treaty]. For a brief history of the negotiations, see César J. Ramirez-Montes, *The Marrakesh Treaty: Study for the PETI Committee*, at 20–26, European Parliament, Directorate-General for Internal Policies (2016). For a history of how copyright L&Es have been negotiated and adopted in international copyright law, see Faith O. Majekolagbe, *The Case for a New International Instrument on Copyright Limitations and Exceptions*, 43 Cardozo Arts & Ent. L.J. 73, 79–94 (2025).

governed by international IP treaties.[8] These treaties now either contain minimum mandatory L&Es that must be included in national IP laws or, more commonly, prescribe conditions for adopting and recognizing L&Es in national laws.[9] Current international norm-setting activities at WIPO include extensive negotiations on L&Es.[10]

Although provisions on L&Es have become pervasive in national and international IP laws alike, there remains significant resistance to L&Es. This resistance is evident in the WIPO Standing Committee on Copyright and Related Rights, where proposals for the establishment of minimum mandatory L&Es face opposition from various state and non-state parties who worry that L&Es could undermine the interests of rightsholders.[11] Less frequently discussed, however, is the debate over L&Es at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC"), where negotiations regarding the protection of Indigenous peoples' interests in GR, TK, and TCEs are ongoing. This is notwithstanding that L&Es provisions have been included in textual negotiations for IP protection for Indigenous peoples since 2012, and L&Es have been formally acknowledged as a core issue to be resolved at the IGC since at least 2015.[12] Contentions regarding L&Es at the IGC became more overt when the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (hereinafter "GRATK Treaty") was being negotiated. The GRATK

8. This is done through the three-step test. The three-step test refers to a set of conditions that countries must comply with in drafting L&Es regarding intellectual property ("IP") rights beyond those specifically enumerated in international IP instruments. *See infra* note 49.

9. *See, e.g.*, Marrakesh VIP Treaty, *supra* note 7, arts. 4–5 (prescribing minimum L&Es that must be recognized in national copyright legislation); *id.* art. 11 (prescribing conditions for recognizing further L&Es in copyright legislation).

10. *See, e.g.*, *Limitations and Exceptions*, WIPO, https://www.wipo.int/copyright/en/limitations/ [https://perma.cc/BDQ5-SUNK] (last visited June 16, 2025).

11. *See Standing Committee on Copyright and Related Rights (SCCR)*, WIPO, https://www.wipo.int/meetings/en/topic.jsp?group_id=62 [https://perma.cc/Z8MF-EANS] (last visited June 16, 2025). See, for example, the U.S. Delegate to the 2019 WIPO International Conference on Limitations and Expression's note that the United States opposed the introduction of mandatory exceptions and that "[i]n the view of the United States, the most productive approach would be for the SCCR [Standing Committee on Copyright and Related Rights at WIPO] to develop high-level principles and objectives for national policy makers to improve or update national copyright exceptions and limitations for libraries and archives, museums and educational institutions." Secretariat, WIPO Standing Comm. on Copyright and Related Rts. [hereinafter WIPO SCCR], Fortieth Session, *Report on Regional Seminars and International Conference on Limitations and Exceptions*, at 65, ¶ 368, WIPO Doc. SCCR/40/2 (Sept. 15, 2020); *see also* Delegation of the United States of America, WIPO SCCR, Forty-Fourth Session, *Updated Version of the Document "Objectives and Principles for Exceptions and Limitations for Libraries and Archives" (SCCR/26/8)*, WIPO Doc. SCCR/44/5 (Nov. 2, 2023).

12. *See* Secretariat, Assemblies of the Member States of WIPO, Fifty-Fifth Series of Meetings, *List of Decisions*, at 11, Item 17 of the Consolidated Agenda ¶ (b), WIPO Doc. A/55/INF/11 (Oct. 22, 2015).

Treaty aims to enhance the patent system's efficacy, transparency, and quality concerning GRs and associated TK ("ATK") through a disclosure-of-origin requirement, while ensuring no erroneous patents are issued for inventions lacking novelty or inventiveness.[13] Adopted in May 2024, the Treaty included no provision on L&Es, neither in the form of specific L&Es that must or could be recognized nor conditions for recognizing L&Es in national laws,[14] despite a provision on L&Es being included in the Basic Proposal for the Treaty and earlier drafts of the Treaty.[15]

This Article examines why the GRATK Treaty lacks L&Es provisions. It argues that omitting L&Es is appropriate because the Treaty establishes defensive protection for Indigenous interests in GRs and ATK through a mandatory disclosure requirement,[16] not substantive rights. Essentially, it is a treaty that establishes an administrative requirement. Multilateral IP treaties that primarily establish administrative requirements typically do not include L&Es because those provisions are designed to determine how far exclusive rights should extend, under what circumstances, and to what extent they should be curtailed.[17] This alone justifies the absence of L&Es in the GRATK Treaty. Additionally, including mandatory or optional L&Es or granting Member States the discretion to permit deviations from the Treaty's disclosure requirement would weaken the defensive protection of the disclosure requirement.

The overarching goal of this Article is to examine how L&Es should be addressed in international efforts to protect Indigenous interests in GRs, TK, and TCEs. This Article looks beyond the GRATK Treaty to the draft treaties

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

14. *Id.* art. 1.

15. Secretariat, Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, *Basic Proposal for an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, at 4, WIPO Doc. GRATK/DC/3 (Dec. 14, 2023) [hereinafter *GRATK Basic Proposal*]; Secretariat, WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore [hereinafter WIPO IGC], Forty-Third Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, at Annex, 10, WIPO Doc. WIPO/GRTKF/IC/43/4 (Mar. 31, 2022).

16. *Id.* art. 3.

17. *See, e.g.*, Diplomatic Conference to Conclude and Adopt a Design Law Treaty (DLT), *Riyadh Design Law Treaty, Regulations under the Riyadh Design Law Treaty and Resolution by the Diplomatic Conference Supplementary to the Riyadh Design Law Treaty and the Regulations Thereunder*, WIPO Doc. DLT/DC/26 (Nov. 25, 2024); Patent Co-operation Treaty, June 19, 1970, *revised* Oct. 3, 2001, 28 U.S.T. 7645, 1160 U.N.T.S. 231 (entered into force June 14, 1972).

focused on the "offensive" or positive protection of TK and TCEs through the grant of exclusive rights. It critiques the application of conventional L&Es provisions, arguing that they fail to recognize the *sui generis*[18] nature of TK and TCEs and the need to respect Indigenous knowledge governance systems. Instead, this Article proposes an "infusion" of Indigenous values and protocols into the legal framework for protecting Indigenous rights, necessitating significant Indigenous participation in shaping L&Es. This approach aims to create an effective legal regime that benefits Indigenous communities.

The Article unfolds as follows. Part I explores the evolution of L&Es during the negotiations that culminated in the GRATK Treaty. It evaluates the propriety of omitting L&Es from the final treaty text. Part II examines the current state of L&Es in the ongoing negotiations for international legal instruments protecting TK and TCEs. It highlights L&Es as a core and contentious issue that must be resolved to achieve meaningful progress toward the conclusion of the instruments. Part III proposes a future direction, outlining four key principles to guide international IP negotiations on L&Es regarding TK and TCEs rights. The Article emphasizes the importance of careful consideration of L&Es in IP treaties concerning Indigenous knowledge, resources, and expressions, whether those be administrative treaties (like the GRATK treaty) or rights-granting treaties for TK and TCEs. It cautions against the uncritical inclusion of L&Es, highlighting their potential to negatively impact Indigenous peoples' multifaceted interests in their GRs, TK, and TCEs as well as their right to self-governance.

I. Limitations and Exceptions and the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge

The IGC was established in 2000.[19] Its mandate spans three core subject matters—genetic resources ("GRs"), traditional knowledge ("TK"), and traditional cultural expressions ("TCEs")—and involves negotiations to finalize an agreement on international legal instruments for their protection.[20] The IGC

18. The nature of rights granted over TK and TCEs is *sui generis* in that the rights do not fall into any of the existing classifications of IP rights because the subject matter of protection (TK and TCEs) "differs in many ways from the underlying subject matter of standard IP rights." Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 Cardozo Arts & Ent. L.J. 37, 89–90 (2009). The negotiation of rights over TK and TCEs at a special committee of WIPO for inclusion in new international instruments demonstrates an understanding of the *sui generis* nature of TK and TCEs at the international level. *See Intergovernmental Committee (IGC)*, WIPO, https://www.wipo.int/en/web/igc [https://perma.cc/G2EV-KRZU]; Background Brief No. 2, *supra* note 2, at 1–3.

19. Background Brief No. 2, *supra* note 2, at 2.

20. *Intergovernmental Committee (IGC)*, *supra* note 18.

addressed them separately under "three tracks": GRs, TK, and TCEs.[21] The tripartite, rather than holistic, approach to negotiations at the IGC resulted in an unequal pace of progress in reaching an agreement on the three tracks, with deliberations on TK and TCEs going at an even pace, partly due to parallel negotiations of texts on TK and TCEs in the same IGC sessions.[22] At the same time, those on GRs advanced considerably faster.[23]

The IGC's work on GRs focused on IP aspects of access to GRs, specifically the defensive protection of GRs by mandating the disclosure of information about GRs and ATK used in patent claims within patent applications.[24] Unlike positive or offensive protection measures, defensive protections do not grant exclusive rights over the subject matter of protection. In the context of GRs, defensive protection through a requirement to disclose sources or origins of GRs and ATK ensures that patents are not granted for inventions that are not novel, a key requirement for patentability.[25] The disclosure also helps to track the contributions of Indigenous peoples to inventions for which others obtain patent protection, ensuring that their contributions to inventions are documented or acknowledged in patent applications and they are compensated under access-benefit sharing schemes.[26]

From 2011 to the conclusion of the GRATK Treaty, the IGC generated multiple textual documents that formed the basis of negotiations for the defensive protection of GRs and ATK. The first of these texts, prepared by the WIPO Secretariat in 2011, stated that the IP system must provide for "mandatory disclosure requirements ensuring that the intellectual property offices become key checkpoints for disclosure and monitoring the utilization of genetic resources, their derivatives and/or associated traditional knowledge."[27] Accordingly, it required persons applying for IP rights involving the use of GRs and ATK to disclose in their applications all background information relating to the GRs and ATK, including the country of source or

21. *See* Chidi Oguamanam, *Understanding African and Like-Minded Countries' Positions at WIPO-IGC*, 60 IDEA 386, 405–10 (2020) (providing an account of how the IGC approached its mandate in a "tripartite" rather than "holistic" manner).

22. *Id.* at 410–11 (explaining that texts on GRs, TK, and TCEs were sometimes "negotiated on an alternating basis" at various sessions of IGC in a biennium, but that "[t]he GRs text was the most mature of the three [texts] as of June 2018").

23. *Id.*

24. *See* Secretariat, WIPO IGC, Fourteenth Session, *Genetic Resources: Overview*, at 2, WIPO Doc. WIPO/GRTKF/IC/14/7 (June 5, 2009); Secretariat, WIPO IGC, Sixteenth Session, *Genetic Resources: Revised List of Options*, at 4–5, WIPO Doc. WIPO/GRTKF/IC/16/6 (Mar. 22, 2010).

25. Oguamanam, *supra* note 21, at 438.

26. *Id.*

27. Secretariat, WIPO IGC, Nineteenth Session, *Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources*, at Annex, 4, WIPO Doc. WIPO/GRTKF/IC/19/6 (May 20, 2011).

origin.[28] There were no qualifications or exceptions to the mandatory disclosure requirement in the 2011 text.

The document, however, generated responses from WIPO Member States, some of which advocated narrowing the scope of the disclosure requirement. The European Community ("EC") and its Member States suggested that the disclosure requirement should only apply where the claimed invention is directly based on the GRs or ATK, that is, where the invention depended on the specific properties of the GRs or ATK.[29] In essence, patent applicants should be exempted from the disclosure requirement when the GRs or ATK have been utilized by chance or where the effectiveness of the claimed invention does not depend on the GRs or ATK. Japan and Switzerland also argued similarly.[30] Additionally, the EC suggested that patent applicants should be able to satisfy the disclosure requirement by declaring the source of the specific GRs (that is, where the inventor had physical access to the GRs) if the country of origin is unknown.[31] These were the earliest recorded proposed exemptions to or narrowing in scope of the disclosure requirement, but these proposals do not constitute proper proposals for conventional L&Es. At best, they provide thresholds or triggers for the imposition of a mandatory duty to disclose and explain how to fulfill such duty. Unsurprisingly, demandeurs[32] of the mandatory disclosure requirement, like the African Group, were unopposed to the changes proposed by the EC and Switzerland.[33] Further, when the WIPO Secretariat prepared a consolidated document on IP and GRs based on the proposals received from Member States, including those of the EC and Switzerland, there was neither a specific exception to the mandatory disclosure requirement nor a discretion granted to Member States to adopt L&Es.[34]

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28. *Id.*

29. Secretariat, WIPO IGC, Twentieth Session, *Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications*, at Annex, 4, WIPO Doc. WIPO/GRTKF/IC/20/INF/8 (Oct. 17, 2011).

30. Secretariat, WIPO IGC, Twentieth Session, *Patent System and Genetic Resources*, at Annex, 10–11, WIPO Doc. WIPO/GRTKF/IC/20/INF/9 (Oct. 17, 2011); Secretariat, WIPO IGC, Twentieth Session, *Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications: Proposals by Switzerland*, at Annex, 7–8, WIPO Doc. WIPO/GRTKF/IC/20/INF/10 (Oct. 17, 2011).

31. Source here "refers to any source from which the applicant has acquired the genetic resource other than the country of origin, such as a research centre, gene bank or botanical garden." WIPO IGC, *supra* note 29, at 3.

32. In the context of the IGC negotiations, "demandeurs" describe countries and groups in favor of granting legal protection and positive rights to Indigenous peoples in relation to their GRs, TK, and TCEs. "Non-demandeurs" describe countries and groups that oppose or otherwise do not support this. *See* Oguamanam, *supra* note 21, at 412–13.

33. Secretariat, WIPO IGC, Twentieth Session, *Proposal of the African Group on Genetic Resources and Future Work*, at Annex, 2–3, WIPO Doc. WIPO/GRTKF/IC/20/1NF/12 (Oct. 17, 2011).

34. *See* Secretariat, WIPO IGC, Twenty-Third Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, WIPO Doc. WIPO/GRTKF/IC/23/4 (Nov. 2, 2012).

A. The Introduction of Limitations and Exceptions to the Disclosure Requirement

The consolidated document on IP and GRs was the basis of deliberations at the twenty-third session of the IGC in February 2013.[35] The discussions at this session led the IGC to develop a revised consolidated document at the close.[36] Reflecting the issues raised at that session by delegates of some Member States, the revised consolidated document introduced bracketed provisions akin to L&Es titled "Exclusions."[37] The "Exclusions" section provides that the disclosure requirement shall not apply to all human GRs, derivatives, commodities, TK in the public domain, GRs found outside of national jurisdictions, and all GRs acquired before the national implementation of the Convention on Biological Diversity ("CBD") and the Nagoya Protocol.[38]

The "Exclusions" provision introduced mandatory exceptions to the disclosure requirement, weakening its defensive protective mechanism for Indigenous peoples' interests. Including these broad exclusions essentially offers protection with one provision while taking it away with another, especially since the consolidated document lacks specific offensive measures to protect Indigenous peoples' interests in GRs and ATK. The exclusions significantly weaken the already insufficient reliance on the disclosure requirement to protect Indigenous peoples' interests in GRs and ATK. The broad exclusions are unjustified and amount to an attempt to derail efforts to achieve global protection of Indigenous peoples' interests in their GRs and ATK. One might recognize it as a ploy to derail negotiations when the exclusions are considered in light of the fact that non-demandeur countries, led by the United States, consistently advocated against the disclosure requirement.[39] Consequently, demandeur countries vehemently opposed the list of exclusions (that is, L&Es).[40]

The 2013 report from an Indigenous Expert Workshop on IP and GRs, TK, and TCEs highlighted that the exclusions significantly undermine the

35. WIPO IGC, *Decisions of the Twenty-Third Session of the Committee*, at 3, WIPO Doc. WIPO/GRTKF/IC/23/REF/DECISIONS (Feb. 8, 2013).

36. *Id.*

37. *See* WIPO IGC, Twenty-Third Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources: Rev. 2*, at Annex, 8, WIPO Doc. WIPO/GRTKF/IC/23/WWW/230222 (Feb. 8, 2013).

38. *Id.*

39. *See* Delegations of Canada, Japan, Norway, the Republic of Korea & the United States of America, WIPO IGC, Twenty-Third Session, *Joint Recommendation on Genetic Resources and Associated Traditional Knowledge*, WIPO Doc. WIPO/GRTKF/IC/23/5 (Jan. 17, 2013) (recommending instead that states decide on the measures they would take to prevent the erroneous grant of patents rather than support the demands for a mandatory disclosure requirement as an appropriate measure to be prescribed under the multilateral IP system).

40. *See* Oguamanam, *supra* note 21, at 451–55 (detailing demandeur countries' opposition to a list of specific exceptions).

effectiveness of the disclosure requirement.[41] Indigenous experts invited from the seven geo-cultural regions of the UN Permanent Forum on Indigenous Issues unanimously agreed that derivatives, commodities, TK in the public domain, and GRs acquired before the implementation of the CBD and the Nagoya Protocol should not be excluded from protection.[42] They noted that the application of a disclosure requirement must be wide-ranging to be effective.[43] Professor James Anaya, the U.N. Special Rapporteur on the Rights of Indigenous Peoples at the time, objected to excluding TK in the public domain from the disclosure requirement, noting it undermines the goal of preventing misappropriation of such knowledge.[44]

A further revision of the consolidated document on IP and GRs in 2014 changed the title of subject matters excluded from protection by the disclosure requirement to "Exceptions and Limitations,"[45] bringing the language in line with what has been used in other international IP instruments. However, unlike other international IP instruments that have provisions on L&Es, the consolidated document's provision on L&Es did not contain the classic three-step test in international IP instruments that permits Member States to develop L&Es for IP protection and prescribes the conditions that must be satisfied to make those L&Es acceptable under international IP law.[46] The absence of the three-step test could be interpreted as an intention not to permit countries to develop and adopt L&Es to the disclosure requirements beyond those already specified in the instrument.

B. The Introduction of the Three-Step Test

In 2016, however, the consolidated document underwent a significant review, and the three-step test was introduced as an alternative approach to dealing with the contentious L&Es issue. The following provision was included:

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41. *See* Secretariat, WIPO IGC, Twenty-Fifth Session, *Report of Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, at Annex I, 6, WIPO Doc. WIPO/GRTKF/IC/25/INF/9 (June 25, 2013).

42. *Id.*

43. *Id.*

44. S. James Anaya, U.N. Special Rapporteur on the Rts. of Indigenous Peoples, Intellectual Property and Genetic Resources: What Is at Stake for Indigenous Peoples?, Keynote Address at the Twenty-Sixth Session of the WIPO IGC 6–7 (Feb. 3, 2014) (transcript available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_26/wipo_grtkf_ic_26_indigenous_panel_james_anaya.pdf [https://perma.cc/G6MX-AB84]).

45. Secretariat, WIPO IGC, Twenty-Eighth Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, at Annex, 8, WIPO Doc. WIPO/GRTKF/IC/28/4 (June 2, 2014).

46. See *infra* note 49 for IP instruments with the three-step test and Section I.B. for discussions on the test.

> In complying with the obligation set forth in Article 3, members may, in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such justifiable exceptions and limitations do not unduly prejudice the implementation of this instrument.[47]

Although the three-step test has been part of international IP law since 1967[48] and appears in at least five multilateral IP treaties,[49] the interpretation of its conditions remains unclear due to only one judicial interpretation test which raised as many questions as it answered about each step's meaning.[50] Further, the three-step test is not monolithic—there is no one three-step test. There are multiple versions of the test.[51] Common to each test are pre-conditions for adopting L&Es in national IP laws that can be divided into three distinct criteria. The above version of the three-step test, when read as a whole, is not the same as any of the other pre-existing versions of the test but shares the characteristics common to other versions of the test. L&Es may be adopted (1) in special cases; (2) if the L&Es are justifiable and necessary to protect the public interest; and (3) if the justifiable L&Es do not unduly prejudice the implementation of the instrument.[52]

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47. Secretariat, WIPO IGC, Thirty-Fourth Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, at Annex, 9, WIPO Doc. WIPO/GRTKF/IC/34/4 (Mar. 15, 2017) (brackets omitted).

48. Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, *revised* July 14, 1967, 828 U.N.T.S. 221 [hereinafter Stockholm Act] ("It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.").

49. Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS Agreement"), for instance, contains a version of the three-step test and provides that: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. The three-step test can also be found in Article 30 of the TRIPS Agreement: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties." *Id.* art. 30; *see also id.* art. 26(2) (stating the three-step test concerning L&Es as it applies to industrial design rights). The test can also be found in WIPO-administered treaties such as the Stockholm Act, *supra* note 48, art. 9(2); WIPO Copyright Treaty (WTC) art. 10(1), Dec. 20, 1996, T.I.A.S. 02-306.1, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty (WPPT) art. 16(2), Dec. 20, 1996, 2186 U.N.T.S. 203; Marrakesh VIP Treaty, *supra* note 7, art. 11.

50. *See* Panel Report, *United States–Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS160/R (adopted June 15, 2000) [hereinafter *Section 110(5) Panel Report*].

51. *See supra* note 49.

52. *See supra* note 49.

The term "special" is commonly used in the three-step test, and the World Trade Organization Dispute Settlement Panel interpreted "special" as contained in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS Agreement") in the *Section 110(5) Panel Report*.[53] The Panel declared that the term means that "an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in a quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective."[54] This interpretation may suggest that an exception that is wide-ranging, like the exclusion of all TK in the public domain, may not constitute an exception that is limited in scope. However, the three-step test under interpretation in the *Section 110(5) Panel Report* is for copyright L&Es[55] rather than L&Es for defensive protection measures like the disclosure requirement, thus limiting its applicability to this context.

What constitutes justifiable L&Es could be broad, but when read with "necessary to protect the public interest,"[56] permitted L&Es might become narrow. Notwithstanding, "the public interest" is far from an exact term and may be subject to abuse by the WIPO Member States that are reluctant to adopt a mandatory disclosure requirement. In the third step of the test, Member States must ensure that the L&Es "do not unduly prejudice this implementation of the instrument."[57] Again, what qualifies is unclear. The test does not allude to the legitimate interests of Indigenous peoples, who should be the true beneficiaries of the disclosure requirement. The three-step test, therefore, leaves much to individual interpretation. While it is challenging to give precise meaning to the criteria a Member State must meet to limit the disclosure requirement in their territory, the three-step test in the consolidated document confirms that Member States have the discretion to adopt L&Es.

Although introduced as an alternative to the specified list of L&Es in the consolidated document on GRs and ATK, the three-step test fails to address concerns about exemptions from the disclosure requirement. The test allows Member States wide latitude to develop L&Es, potentially leading to the adoption of L&Es that are as broad as or even broader than the unwelcomed pre-existing list of L&Es that undermine the disclosure requirement's effectiveness. The test's wording and the lack of reference to Indigenous peoples suggest their concerns were not prioritized. Instead, the interests of non-demandeur countries seem central, resulting in a relaxed version of the test. This, combined with the persistence

53. *See Section 110(5) Panel Report*, *supra* note 50, ¶¶ 6.102–6.109.
54. *Id.* ¶ 6.109.
55. *Id.* ¶ 2.1–2.2.
56. TRIPS Agreement, *supra* note 49, art. 13.
57. *Id.*

of the United States and allies to block progress towards a mandatory disclosure requirement,[58] indicates the test aims to empower non-demandeur countries rather than address the legitimate concerns that L&Es could be weaponized to water down the protection of Indigenous interests in GRs and ATK.

Whereas IP scholars have long rightly criticized the restrictiveness of the existing versions of the three-step test and advocated for a relaxed version or interpretation of the test,[59] the issue of L&Es in the context of the legal protection of Indigenous people's rights within the IP framework is more nuanced and warrants separate consideration.[60] We must pay attention to the fact that the three-step test has historically worked in favor of powerful countries and the interests of conventional IP rightsholders, and it is no different in the present context.[61] Instead of empowering Indigenous peoples and local communities in the developed and developing world, a relaxed three-step test enables powerful countries to suppress Indigenous interests and prioritize the interests of conventional IP rightsholders.

Subsequent deliberations and amendments to the consolidated document confirmed that the framework of L&Es was being used as a strategic tool to carve out a wide space of non-compliance with the disclosure requirement. A 2018 amendment saw the addition of GRs and ATK "necessary to protect human, animal or plant life or health [including public health] or to avoid serious prejudice to the environment" to the list of specific L&Es.[62] The proposal to increase the list of L&Es suggests that non-demandeur countries consider the alternatives as either having a broad and vague three-step test that gives powerful countries the latitude to adopt a wide range of L&Es or having a list of specific L&Es that are as wide-ranging as possible.

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58. *See* Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America, *supra* note 39.

59. *See, e.g.*, Christophe Geiger et al., *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law,* 29 Am. Univ. Int'l. L. Rev. 581, 616 (2014).

60. *See infra* Part III.

61. See, for example, the U.S. challenge to copyright reforms that are aimed at expanding copyright L&Es in South Africa on the basis that the reforms do not comply with the three-step test, which prompted South Africa to send a communication to the Council for Trade-Related Aspects of Intellectual Property Rights concerning the copyright three-step test. *Copyright and Related Issues: USTR GSP trade threats re: Bill*, IIPA 2019 Special 301 Report on Copyright Protection and Enforcement, Uni. Witwatersrand, Johannesburg, https://libguides.wits.ac.za/Copyright_and_Related_Issues/tradeissues [https://perma.cc/VR2C-J4F8] (last updated Jan. 25, 2024, 3:13 PM); Communication from South Africa, *Intellectual Property and the Public Interest: The WTO Trips Agreement and the Copyright Three-Step Test*, WTO Doc. IP/C/W/663 (Jan. 29, 2020).

62. WIPO IGC, Thirty-Fifth Session, *The Consolidated Document Relating to Intellectual Property and Genetic Resources REV. 2 (clean)*, at 11, WIPO Doc. WIPO/GRTKF/IC/35/REF/FACILITATORS TEXT REV. 2 (Mar. 23, 2018).

The mechanism of L&Es was being used as an alternative weapon to decimate the disclosure requirement should efforts to completely block its adoption fail. This becomes clear when one considers the connection between an administrative requirement to disclose the utilization of GRs and ATK in an invention when applying for a patent and the proposals to exempt certain GRs and ATK from disclosure. For instance, what "public interest" is sought to be protected by excluding GRs and ATK necessary to protect human, animal, or plant life from the disclosure requirement? The United States argued, though unconvincingly, that the disclosure requirement would cause significant delays in the patent examination process and that "it also could negatively affect the resource-intensive drug development process by reducing the patent's valuation and making investments into research and development imprudent."[63] Essentially, the United States was not enthusiastic about having a disclosure requirement, and the L&Es mechanism appeared to be aimed at weakening the requirement. There has been no concrete justification for an exception to the disclosure requirement. While it has been suggested that the main reason may be to expedite research involving the use of GRs and ATK, this was not substantiated.[64] It is difficult to imagine that the requirement to disclose the origin or source of GRs and ATK used (if known) would otherwise cause delays in research and development.

C. Should There Be Limitations and Exceptions to the Disclosure Requirement?

The use of L&Es as a mechanism to significantly undermine the interests of Indigenous peoples led the IGC Chair-designate at the time, Ian Goss, to identify L&Es as an issue that Member States should focus on addressing.[65] He brought an important question to the table: "*Should there be exceptions and limitations to a disclosure requirement*, and if so, which ones?"[66]

On his own initiative, Mr. Goss prepared a "Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (hereinafter "Chair's text") in

63. Delegation of the United States of America, WIPO IGC, Thirty-Sixth Session, *The Economic Impact of Patent Delays and Uncertainty: U.S. Concerns about Proposals for New Patent Disclosure Requirements*, at Annex, 1, WIPO Doc. WIPO/GRTKF/IC/36/10 (June 26, 2018); *see also* Dominic Keating, *The WIPO IGC: A U.S. Perspective*, *in* Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 265, 270–71 (Daniel F. Robinson et al. eds., 2017).

64. Sean M. Fill-Flynn, *Limitations and Exceptions in the WIPO Instrument on Genetic Resources and Associated Traditional Knowledge*, 129 Joint PIJIP/TLS Rsch. Paper Series 4 (2024).

65. Ian Goss (IGC Chair-designate), *Information Note for IGC 35*, at 3, WIPO Doc. WIPO/GRTKF/IC/35/REF/CHAIR-DESIGNATE INFORMATION NOTE (Mar. 16, 2018).

66. *Id.* (emphasis added).

2019.[67] The Chair's text was prepared to reflect policy interests addressed by Member States and other stakeholders since text-based negotiations commenced and, in particular, "to balance the interests and rights of the providers and users of GRs and Associated TK, without which, in {Mr. Goss's} view, a mutually beneficial agreement will not be achieved."[68] Article 4 of the Chair's text, titled "Exceptions and Limitations," provides as follows: "In complying with the obligation set forth in Article 3, Contracting Parties may, in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such justifiable exceptions and limitations do not unduly prejudice the implementation of this instrument or mutual supportiveness with other instruments."[69] The IGC Chair-designate presumptively answered the question of whether there should be L&Es to the disclosure requirement in the affirmative and preferred a modified three-step test to a list of specific L&Es. It seems that the Chair-designate did not first answer his original question of whether there should be L&Es in the instrument but instead opted for what appeared to be the path of least resistance regarding the L&Es issue.

The Chair's text did not replace the consolidated document but was adopted as a working document and supplement to the consolidated document.[70] A 2022 amendment to the consolidated document amended the three-step test in the document to include the phrase "or mutual supportiveness with other instruments" from the Chair's text.[71] However, the consolidated document still listed specific L&Es, leaving the issue of L&Es unresolved.[72] In 2023, Indigenous experts criticized the Chair's text, arguing that allowing Member States to determine L&Es "is problematic"[73] and there "there should be no exceptions and limitations to the protection provided in the instrument(s) for GRs."[74] They rejected both the three-step test and the specific list of L&Es. The experts insisted that if L&Es were included, they must "only be adopted in consultation with Indigenous Peoples and local communities and with the

67. 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).

68. *Id.* at 1.

69. *Id.* at 11.

70. WIPO IGC, *Decisions of the Fortieth Session of the Committee*, at 4, WIPO Doc. WIPO/GRTKF/IC/40/DECISIONS (June 21, 2019).

71. Secretariat, WIPO IGC, Forty-Third Session, *Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2 (Mar. 4, 2022)*, at Annex, 10, WIPO Doc. WIPO/GRTKF/IC/43/4 ANNEX (Mar. 31, 2022).

72. *Id.*

73. Secretary, Special Session of the WIPO IGC, *Report of Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, at Annex I, 7, WIPO Doc. WIPO/GRTKF/IC/SS/GE/23/INF/6 (June 27, 2023).

74. *Id.* at 10.

free, prior and informed consent of Indigenous Peoples."[75] Ultimately, the Basic Proposal for the diplomatic conference to conclude an international legal instrument relating to IP, GRs, and ATK[76] included the Chair's three-step test for L&Es.[77]

On May 13, 2024, negotiations at the diplomatic conference for the adoption of the international legal instrument relating to IP, GRs, and ATK commenced based on the Basic Proposal.[78] During the diplomatic conference, the L&Es provision in the Basic Proposal was keenly contested.[79] By May 15, 2024, the chair of Committee I of the diplomatic conference reported that "there appears to be adequate support for eliminating Article 4, limitations and exceptions. Some parties opposed."[80] In the end, those who called for the removal of the L&Es provision prevailed. In the final text adopted as the GRATK Treaty on May 24, 2024, a provision on L&Es was conspicuously absent.[81] The question of whether there should be L&Es to a disclosure requirement was definitively answered in the negative. There was no meaningful justification to grant Member States the discretion to adopt L&Es to the application of the disclosure requirement.

The GRATK Treaty rightly excludes L&Es for two reasons. First, L&Es are inappropriate for a treaty focused on disclosure requirements, an administrative requirement for patent applications. Treaties like the Patent Cooperation Treaty ("PCT")[82] and the Riyadh Design Law Treaty,[83] which also focus on administrative requirements, lack L&Es. Second, including L&Es provisions in the GRATK Treaty would have weakened the disclosure requirement as a limited defensive protection for Indigenous interests. Unlike treaties granting strong exclusive rights, the GRATK Treaty does not grant exclusive rights and offers minimal protection to Indigenous peoples. Adding L&Es would render the treaty ineffective, especially considering the significant discretion given to contracting parties to determine the consequences for non-disclosure.[84]

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75. *Id.*

76. *See* Special Session of the WIPO IGC, *Decisions*, at Annex, 2, WIPO Doc. WIPO/GRTKF/IC/SS/GE/23/4 (Sept. 8, 2023).

77. *See id.* at 5; *GRATK Basic Proposal*, *supra* note 15.

78. *Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge*, WIPO, https://www.wipo.int/diplomatic-conferences/en/genetic-resources/ [https://perma.cc/863N-FSUA].

79. Fill-Flynn, *supra* note 64, at 1.

80. *Id.*

81. *See* GRATK Treaty, *supra* note 13.

82. Patent Cooperation Treaty, *supra* note 17.

83. *See* Riyadh Design Law Treaty, *supra* note 17.

84. GRATK Treaty, *supra* note 13, art. 5.

II. The Current State of Limitations and Exceptions in the WIPO IGC Negotiations

The issue of L&Es was under debate in the TK and TCEs tracks of the IGC negotiations while similar discussions were happening in the GRs track. Unlike the GRATK Treaty, the proposed legal instruments on TK and TCEs seek to establish exclusive rights. Provisions on L&Es (including closely connected provisions on the scope and term of protection) have, therefore, been included and debated in the IGC negotiations on TK and TCEs since the first version of the draft WIPO Instruments on TK and TCEs[85] were developed by the IGC in 2012.[86] L&Es were first recognized under the IGC mandate for the 2016/2017 biennium as a core issue that the Committee must address to establish a common understanding among Member States in discussions regarding TK and TCEs.[87] Since then, L&Es have remained recognized as a core issue in the renewed IGC mandates.[88] Under the IGC mandate for the 2024/2025 biennium, the Committee is required to continue working on the protection of TK and TCEs "with a primary focus on narrowing existing gaps and reaching a common understanding on core issues."[89] The "[c]ore issues include as applicable, inter alia, definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK and TCEs are entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain."[90]

The primary justification for L&Es provisions in the TK and TCEs instruments somewhat aligns with the rationales for L&Es in other rights-granting

85. Secretariat, WIPO General Assembly, Forty-First (21st Extraordinary) Session, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, at Annex B, 21, C, 10, WIPO Doc. WO/GA/41/15 (Aug. 1, 2012) (presenting the first drafts prepared at the IGC which included provisions on L&Es to the WIPO General Assembly).

86. Secretariat, WIPO IGC, Forty-Ninth Session, *The Protection of Traditional Knowledge: Draft Articles*, at Annex, 20–22, WIPO Doc. WIPO/GRTKF/IC/49/4 (Oct. 4, 2024) [hereinafter *TK Draft Articles*] (showing that L&Es provisions are still contained in the most recent version of the draft WIPO TK instrument); Secretariat, WIPO IGC, Forty-Ninth Session, *The Protection of Traditional Cultural Expressions: Draft Articles*, at Annex, 16–18, WIPO Doc. WIPO/GRTKF/IC/49/5 (Oct. 4, 2024) [hereinafter *TCEs Draft Articles*] (showing that L&Es provisions are still contained in the most recent version of the draft WIPO TCEs instrument).

87. *See* Assemblies of the Member States of WIPO, *supra* note 12, at 11 ¶ (b).

88. *See* Secretariat, WIPO General Assembly, Forty-Ninth (23rd Ordinary) Session, *Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, at 11, ¶ (b), WIPO Doc. WO/GA/49/11 (Aug. 2, 2017); Secretariat, WIPO General Assembly, Fifty-Fourth (25th Ordinary) Session, *Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, at 2, ¶ (b), note 1, WIPO Doc. WO/GA/54/10 (Sept. 14, 2021).

89. *IGC Mandate 2024–2025*, *supra* note 3, at 2, ¶ (c).

90. *Id.* at note 1.

IP instruments: to limit the effect of rightsholders' monopoly on the public interest in access and use of the subject matter of IP rights.[91] L&Es thus serve as a balancing framework. This framework considers both the public interest and the specific interests of the rightsholders,[92] in this case, Indigenous peoples. In its broadest sense, the framework of L&Es encompasses doctrinal boundaries of the scope of protection granted to rightsholders under an IP system. Therefore, it includes provisions that define the scope of the subject matter covered under the IP system, with the effect that anything not covered is excluded from protection;[93] provisions that set term limits, resulting in the cessation of legal protection after the term expires;[94] and, provisions that permit access to and use of the protected subject matter during the term of protection, typically found in the formal L&Es section of IP laws.[95] However, the debates around L&Es at the IGC are somewhat siloed; the three boundary-creating provisions are treated as distinct, though closely connected. This is reflected in the IGC mandate[96] and draft WIPO Instruments on TK and TCEs.[97] Provisions that permit access to and use of the protected subject matter during the term of protection are considered L&Es provisions properly so called and form the content of L&Es articles in the draft WIPO Instruments on TK and TCEs.[98] As a result, this Article focuses on the narrow sense of the L&Es framework, although most of the discussion is relevant to negotiations on the scope and terms of protection. In the context of international IP law, the issue of L&Es also includes determining the latitude that states should have in determining the scope of their national framework of L&Es. The discussion here, therefore, also includes this dimension of the issue.

The articles on L&Es in the draft WIPO TK and TCEs instruments contain provisions on the general discretion that Member States have to develop L&Es relating to TK and TCEs protection in their national laws.[99] It also includes provisions on specific L&Es that Member States may and must provide for in

91. *See* Okediji, *supra* note 6.

92. *Id*.

93. *See* Copyright Act, R.S.C. 1985, c. C-42, s. 5 (detailing a closed list of works in which copyright subsists) (Can.).

94. *Id*. s. 23 (on the maximum term for which copyright can subsist in works).

95. *Id*. ss. 29–32 (a list of permitted uses of copyrighted works).

96. *IGC Mandate 2024–2025*, *supra* note 3, ¶ (c) (identifying the subject matter of protection, scope of protection, and L&Es as distinct issues).

97. *See TK Draft Articles*, *supra* note 86, arts. 3, 5, 9–10; *TCEs Draft Articles*, *supra* note 86, arts. 3, 5, 7–8 (These documents are jointly referred to in the Article text as draft WIPO Instruments on TK and TCEs.).

98. *TK Draft Articles*, *supra* note 86, art. 9; *TCEs Draft Articles*, *supra* note 86, art. 7.

99. *TK Draft Articles*, *supra* note 86, arts. 9.1–9.2; *TCEs Draft Articles*, *supra* note 86, arts. 7.1–7.2.

national laws protecting TK and TCEs.[100] The L&Es provisions in the instruments contain alternative and heavily bracketed provisions, revealing a tension between Member States that purport to represent the general public interests and Member States advocating for legal instruments that effectively protect the interests of Indigenous peoples, as well as the difficulties in achieving a consensus on whether L&Es should be included, and if so, how they should be designed.

Regarding the discretion to develop and adopt L&Es outside of those specified in an international instrument on TK and TCEs, the draft instruments contain alternative provisions with differing conditions on the exercise of states' discretion.[101] The conditions prescribed in two alternative provisions mirror the three-step test that exists in many international IP instruments. Member States may adopt L&Es that are appropriate or justifiable, and necessary to protect the public interest or legitimate interests of third parties, in consultation with Indigenous peoples (where applicable), and such L&Es must not unreasonably conflict with or prejudice the rights or interests of Indigenous peoples.[102] There is a general concern among the demandeurs and supporters of an international instrument on TK and TCEs that such provisions can be weaponized by States reluctant to recognize Indigenous peoples' rights in TK and TCEs. In effect, they could develop and adopt provisions on L&Es in national laws to take away any protection that they may otherwise accord to Indigenous peoples.[103] The concern is further aggravated by the fact that these provisions either do not mandate consultation with Indigenous peoples or make it easy for states to bypass consultation.

The third and most comprehensive alternate provision on the scope of states' discretion in adopting L&Es is reproduced below:

> 9.1 [Member States]/[Contracting Parties] [may] [should] adopt appropriate limitations and exceptions under national law [with the free, prior and informed consent or approval and involvement of the beneficiaries] [in consultation with the beneficiaries] [with the involvement of beneficiaries] [, provided that the use of [protected] traditional knowledge: (a) (b) (c) (d) [acknowledges the beneficiaries, where possible;] [is not offensive or derogatory to the beneficiaries;] [is compatible with fair practice;] or [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

100. *TK Draft Articles*, *supra* note 86, arts. 9.3–9.7; *TCEs Draft Articles*, *supra* note 86, arts. 7.3–7.5.

101. *TK Draft Articles*, *supra* note 86, arts. 9.1–9.2; *TCEs Draft Articles*, *supra* note 86, arts. 7.1–7.2.

102. *TK Draft Articles*, *supra* note 86, art. 9 [Facilitators' Alt & Alt 1]; *TCEs Draft Articles*, *supra* note 86, art. 7 [Facilitators' Alt & Alt 1].

103. *See* Secretariat, WIPO IGC, Forty-Seventh Session, *Report of Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, at Annex I, 7, WIPO Doc. WIPO/GRTKF/IC/47/INF/9 (May 1, 2023) [hereinafter *Report of Indigenous Expert Workshop*].

> 9.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional knowledge, [Member States]/[Contracting Parties] [may]/[shall]/[should] not establish exceptions and limitations.][104]

This alternate provision requires Member States to adopt L&Es with the consultation or involvement of Indigenous peoples and their free, prior, and informed consent. At an Indigenous Expert Workshop organized by the WIPO Secretariat and the Secretariat of the UN Permanent Forum on Indigenous Issues in February 2023, the experts noted that this is a preferred approach.[105] This would give Indigenous peoples the agency to determine permissible L&Es and ensure that the use of TK and TCEs does not violate their laws, traditions, and customs, thereby recognizing and affirming the legitimacy of Indigenous knowledge systems. According to the Indigenous experts, where L&Es are not determined in consultations with Indigenous peoples under free, prior, and informed consent, "there is a risk that the conditions under which TK and TCEs are excluded from intellectual property protection run counter Indigenous Peoples' right to self-determination and the principle of FPIC [free, prior, and informed consent]."[106]

In addition to the provision on the scope of states' discretion in adopting L&Es, the draft TK and TCEs instruments also list specific L&Es that Member States may and must incorporate into their national laws. These L&Es allow for the use of TK and TCEs without the consent of Indigenous peoples in cases of national emergency or other extreme urgency.[107] They also permit the use of TK and TCEs for teaching, learning, and research; preservation, display, research, and presentation in archives, libraries, museums, or cultural institutions; as well as for the creation of copyrighted works, among other uses.[108] The specific L&Es mirror those in conventional IP instruments, suggesting little to no consideration for the *sui generis* nature of the legal protection of TK and TCEs. None of the alternative provisions on specific L&Es in the draft TK and TCEs instruments give Indigenous peoples discretion over the terms of usage. Indigenous experts argue that to avoid uses that violate the laws, traditions, and customs of Indigenous peoples, any specific L&Es in international instruments on TK and TCEs must be subject to free, prior, and informed consent.[109]

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104. *TK Draft Articles*, *supra* note 86, arts. 9.1, 9.2 [Alt 2]; *see also TCEs Draft Articles*, *supra* note 86, arts. 7.1, 7.2 [Alt 3].

105. *Report of Indigenous Expert Workshop*, *supra* note 103, at Annex I, 7.

106. *Id.*

107. *TK Draft Articles*, *supra* note 86, art. 9.3; *TCEs Draft Articles*, *supra* note 86, art. 7.3.

108. *TK Draft Articles*, *supra* note 86, art. 9.3; *TCEs Draft Articles*, *supra* note 86, art. 7.3.

109. *Report of Indigenous Expert Workshop*, *supra* note 103, at Annex I, 7.

The lack of any requirement to consult with and obtain the consent of Indigenous peoples suggests that there seems to be an unfounded belief that the uses permitted under the specific L&Es cannot violate the customs and traditions of Indigenous peoples or otherwise cause irreparable harm to Indigenous peoples and their communities. Yet, some of the listed specific exceptions allow for the (mis)appropriation of TK and TCEs. For instance, it is permissible to use the TK and TCEs of an Indigenous community to create an "original" work of authorship and obtain copyright protection without the consent of the relevant Indigenous community.[110] Even if the derivative work is commercialized, there is no requirement to compensate the community.[111] Further, under the draft instrument, TK cannot be deemed to have been misappropriated or misused if the TK was obtained from a printed publication.[112] This applies even if the TK of Indigenous peoples is shared with others who print it without the prior informed consent of the Indigenous peoples or without providing them with an adequate understanding of the implications of publishing the TK. Even seemingly innocuous L&Es, such as those that permit the use of TK and TCEs for teaching, learning, and research, as well as preservation, display, research, and presentation in archives, libraries, museums, or cultural institutions, could be harmful to Indigenous peoples. Throughout history, researchers, libraries, museums, and cultural institutions have all played a significant role in misappropriating TK and TCEs.[113]

While Indigenous experts advocated for the complete removal of L&Es from the draft WIPO TK and TCEs instruments,[114] this is unlikely to succeed. These instruments aim to grant Indigenous peoples exclusive rights, unlike the GRATK Treaty.[115] Attempting to exclude L&Es could disrupt negotiations, and even if successful, would not automatically prevent Member States from adopting them. It might also imply that negotiators intended to leave the decision on L&Es entirely to Member States, since all rights-granting international IP instruments contain such discretion, potentially harming Indigenous interests.[116] However, properly designed L&Es could serve positive purposes, including improving human flourishing, without undermining Indigenous rights or harming Indigenous interests.

110. *TK Draft Articles*, *supra* note 86, art. 9.3; *TCEs Draft Articles, supra* note 86, art. 7.3.
111. *TK Draft Articles*, *supra* note 86, art. 9.3; *TCEs Draft Articles, supra* note 86, art. 7.3.
112. *TK Draft Articles*, *supra* note 86, art. 9.6(a).
113. Oguamanam, *supra* note 21, at 456–57.
114. *Report of Indigenous Expert Workshop*, *supra* note 103, at Annex I, 7.
115. *See TK Draft Articles*, *supra* note 86, art. 5; *TCEs Draft Articles*, *supra* note 86, art. 5.
116. *Report of Indigenous Expert Workshop*, *supra* note 103, at Annex I, 7 (acknowledging that leaving Member States to determine L&Es "is problematic, as it opens for the possibility for States to decide that certain TK and TCEs are not to be subject to protection at all").

III. Pathway Forward

The following four principles should guide international and domestic IP discussions regarding L&Es to Indigenous peoples' rights in TK and TCEs.

(i) Acknowledge and consider the fundamental differences in the justifications for protecting TK and TCEs compared to conventional IP regimes in L&Es discussions.

(ii) Recognize that L&Es can be misused and weaponized to undermine the legitimate interests of Indigenous peoples in TK and TCEs. This is particularly concerning given the view held by some that TK and TCEs are public domain elements and should be freely accessible.

(iii) Pursue and develop an Indigenized L&Es framework through meaningful consultations with Indigenous peoples, ensuring their interests are genuinely accommodated.

(iv) Establish an international benchmark for adopting L&Es tailored to the TK and TCEs context. This will prevent the arbitrary adoption and implementation of L&Es in domestic TK and TCEs instruments that could undermine Indigenous peoples' rights and interests.

A. Consider the Justifications for Protecting Traditional Knowledge and Cultural Expressions

Any debate on L&Es regarding legal rights in TK and TCEs must begin with a fundamental understanding of the differing justification for their protection compared to conventional IP regimes. The justifications for TK and TCEs are not synonymous with the labor[117] or utility-based theory[118] that permeates conventional IP reasonings.[119] Many scholars have shown why rationalizing TK

117. "The philosophic root of this perspective is John Locke's famous contention that, in a state of nature, labor expended in cultivating a tract of land previously 'held in common' gives the laborer a natural property right in the tract (subject to certain provisos)—a right that the state, when it comes into being, has an obligation to respect and enforce. Many judges and scholars have taken the position that the same moral principle justifies granting to authors and inventors analogous protection (for limited times) for their respective writings and inventions—subject to some important limitations also grounded in Locke's argument." William Fisher, *The Puzzle of Traditional Knowledge*, 67 Duke L.J. 1511, 1543 (2018) [hereinafter Fisher, *Puzzle*]; *see also* William Fisher, *Theories of Intellectual Property*, *in* New Essays in the Legal and Political Theory of Property 168, 170–71 (Stephen R. Munzer ed., 2001).

118. This is based on utilitarianism and states that IP rights, which operate as legal impediments to the free flow of ideas and information, "may be justified when necessary to stimulate socially beneficial innovation that otherwise would not occur. Much of patent and copyright law is commonly justified on that basis." Fisher, *Puzzle*, *supra* note 117, at 1547.

119. *See* Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 San Diego L. Rev. 1215, 1238–51 (2012); David R. Hansen, *Protection of Traditional Knowledge: Trade Barriers and the Public Domain*, 58 J. Copyright Soc'y U.S.A. 757, 773 (2010);

and TCEs protection based on labor or utility is weak and inappropriate.[120] This does not, however, mean that there are no strong justifications for the legal protection of TK and TCEs; those justifications are simply different from those underlying conventional IP regimes.[121]

Some of the more fitting and plausible justifications for protecting TK and TCEs include culture and spirituality. TK and TCEs are integral to the culture and identities of Indigenous peoples, and unauthorized use by outsiders can corrode these cultures and identities.[122] The spiritual aspects of TK and TCEs are also crucial to Indigenous peoples, who seek legal protection to maintain their sacredness.[123]

Perhaps the most compelling rationale for recognizing and protecting TK and TCEs nationally and internationally, however, is colonialism and the historical and continuing unjust dispossession of Indigenous peoples' resources.[124] The injustice to Indigenous peoples includes ongoing exploitation and misuse of these resources by external parties.[125] This situation is further exacerbated when these parties acquire IP rights for creations and "innovations" that use TK and TCEs or are derived from TK and TCEs to the detriment or exclusion of Indigenous peoples.[126] The dispossession of the landed and nonlanded resources of Indigenous peoples, as well as the undue exploitation and

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Munzer & Raustiala, *supra* note 18, at 59–61, 73–75; Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal. L. Rev. 1331, 1354 (2004).

120. *See* Okediji, *supra* note 1, at 83 ("[F]amiliar rationalizations derived from IP law, such as that a creator or author is entitled to profit from their labor, can only be awkwardly applied to TK. Likewise, a utilitarian rationale of the need to incentivize innovation offers a poor fit, given that Indigenous communities are unlikely to be moved by the preferences of the wider public."); Fisher, *Puzzle*, *supra* note 117, at 1543–48 (arguing that there is a fundamental difficulty with relying on the labor theory to justify legal protection for TK since "typically, the efforts of the original developers of the knowledge were undertaken for reasons unrelated to control over the knowledge"; and that while patent and copyright law are commonly justified based on utilitarianism, "the desirability of creating intellectual property rights in order to stimulate innovation seems inapposite in the context of traditional knowledge, where the relevant innovative activity by definition has already occurred").

121. Okediji argues that "[t]o the extent traditional knowledge fails to satisfy standard property justifications, it is because those justifications are imbued with assumptions that are misaligned with the conditions that inform the productive and creative processes of Indigenous groups and local communities." Ruth L. Okediji, *Traditional Knowledge and the Public Domain*, CIGI Papers No. 176, 4 (2018).

122. Fisher, *Puzzle*, *supra* note 117, at 1553; Fisher, *supra* note 1, at 366–68; *see also* Okediji, *supra* note 1, at 83 (arguing that the protection of TK and TCEs could offer Indigenous groups the opportunity to maintain their own distinctive knowledge governance practices); Munzer & Raustiala, *supra* note 18, at 47 (arguing that some Indigenous peoples seek legal protection for their TK because the knowledge is important to them for cultural reasons).

123. *See* Munzer & Raustiala, *supra* note 18, at 47.

124. Okediji, *supra* note 1, at 83; Munzer & Raustiala, *supra* note 18, at 47.

125. *See* Okediji, *supra* note 1, at 83.

126. *Id.*

misappropriation of those resources, have worked in tandem with other factors to put Indigenous communities "among the poorest and most disadvantaged in the world."[127] This makes distributive justice a key concern in the TK and TCEs discussion.[128] The legal protection of TK and TCEs can improve the economic position of Indigenous peoples and facilitate their flourishing by enhancing their ability to derive income from TK and TCEs.[129]

The distinct justifications for protecting TK and TCEs have necessitated a *sui generis*[130] system.[131] This approach offers flexibility in developing legal frameworks tailored to the governance of TK and TCEs, as it is not bound by the constraints of existing IP frameworks.[132] When considering L&Es to rights in TK and TCEs, it is crucial to recognize their unique characteristics and the rationale for extending IP protection through a *sui generis* regime. Decisions regarding L&Es must be informed by these. Simply applying conventional IP balancing mechanisms or knowledge governance frameworks to TK and TCEs protection, without appreciating and accommodating the unique experiences and interests of Indigenous peoples and communities, risks violating fundamental principles of fairness, liberty, and justice. These principles must be central to any legal order protecting TK and TCEs.

Moving beyond conventional IP's L&Es framework and focusing on the distinct justifications for TK and TCEs in L&Es discussions can result in a knowledge governance framework that respects and supports the cultural, spiritual, and economic interests of Indigenous peoples.

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127. Molly Torsen & Jane Anderson, Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives 14 (2010), https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf [https://perma.cc/6D6F-D27P]; *see also* Fisher, *supra* note 1, at 366–67 (noting that "[I]ndigenous groups almost always suffer from more severe economic disadvantages than other groups within the countries where they live").

128. Chander & Sunder, *supra* note 119, at 1354–55 (arguing that rights in TK and TCEs are difficult to justify under traditional IP jurisprudence and as such, rather than rely on incentives or utilitarianism to justify these rights, we may focus on the distributional consequences of recognizing rights in TK and TCEs).

129. Fisher, *Puzzle*, *supra* note 117, at 1549–51; Fisher, *supra* note 1, at 366–67; *see also* Hughes, *supra* note 119, at 1256 ("It is fair to say that distributive justice concerns are implicitly front and center in the TK and TCE discussions . . . the TK and TCE discussion is about establishing new intellectual property rights as a way to redistribute wealth.").

130. *See* Munzer & Raustiala, *supra* note 18.

131. *See id.* at 90.

132. Jane Anderson, Indigenous/Traditional Knowledge and Intellectual Property 34 (Center for the Study of the Public Domain 2010), https://web.law.duke.edu/cspd/itkpaper/ [https://perma.cc/PVR8-29PE].

B. Design the Framework of Limitations and Exceptions in Light of Possible Harms to Indigenous Interests

It is also crucial to design any framework of L&Es with consideration of the potential harms to Indigenous interests of legally permitted uses of TK and TCEs. To understand why the mechanism of L&Es could prove threatening to the interests of Indigenous peoples, it is necessary to consider two points: (i) the real possibility that the demand for L&Es is connected to the strongly held view in some circles that TK and TCEs are public domain elements that should be available to the public to access and use freely; and (ii) the particular harms that could be inflicted on Indigenous communities when TK and TCEs are misused.

The main argument against granting legal rights to Indigenous peoples in respect of their TK and TCEs is that they should be considered public domain elements available to be exploited and used without the consent of the Indigenous custodians and owners.[133] Led by the United States, Western countries for many years stalled progress at the IGC towards the legal recognition of Indigenous peoples' rights over their TK and TCEs under the banner of protecting the public domain.[134] Even some IP scholars expressed "skepticism about TK protection" out of concern for the public domain and have argued that "expansive protection of TK would . . . remove what is now in the public domain from that domain."[135]

While the benefits of an expansive public domain are not lost on the many scholars who champion the interests of Indigenous peoples and support the grant of property-like rights to them over their TK and TCEs, the protection of the public domain at the expense of continued injustice to an oppressed

133. *See* Okediji, *supra* note 121, at 2 ("Amid the notable arguments against recognition of proprietary rights for traditional knowledge holders, the most provocative is the claim that such knowledge is already in the public domain."); Okediji, *supra* note 1, at 86; *see also* Ruth L. Okediji, *Is the Public Domain Just?: Biblical Stewardship and Legal Protection for Traditional Knowledge Assets*, 45 Colum. J. L. & Arts 461, 479 (2022) ("Thus far, however, the most powerful argument against recognizing some exclusive rights in genetic resources and TK is the importance of preserving the public domain.").

134. Chidi Oguamanam, *Wandering Footloose: Traditional Knowledge and the Public Domain Revisited*, 21 J. World Intell. Prop. 306, 311 (2018); Ruth L. Okediji, *Negotiating the Public Domain in an International Framework for Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, *in* Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 141, 143 (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe, eds., Routledge 2017).

135. Munzer & Raustiala, *supra* note 18, at 41.

and vulnerable group amounts to dispossessing Indigenous peoples of their resources and "forcing" these resources into the "commons."[136] Such dispossession and transfer of dispossessed resources under an IP regime that was not developed in consultation with Indigenous peoples, nor does it accommodate their interests, offend the principles of justice, which must underlie debates for property rights over TK and TCEs.[137] Expanding the public domain by exploiting the labor of the disempowered and vulnerable does not enhance human flourishing. Instead, it leaves the most vulnerable behind in the struggle for human development. In this context, the public domain becomes a tool wielded by large pharmaceutical and agricultural companies to reduce their costs of "innovation" while the by-products of their innovation are out of reach to the forced contributors to the public domain, doubly jeopardizing the flourishing of Indigenous peoples and their communities.[138]

When the argument that TK and TCEs are public domain elements failed due to its overwhelming injustice, opponents of rights in TK and TCEs turned to another tool in the conventional IP arsenal: the mechanism of L&Es.[139] Since provisions on L&Es range from limits on the duration of protection to specific carve-outs from the protection and entitlements over IP rights granted under a legal instrument, they could, to some extent, be used to achieve similar ends as the public domain weapon. If carefully designed to achieve the same ends, L&Es provisions can be used to take from Indigenous peoples the protection that a legal instrument on TK and TCEs purports to guarantee them. This naturally causes skepticism. It raises the question of whether the demand for L&Es in the TK and TCEs instruments is a new coloration of earlier contestations over TK and TCEs rights on the grounds of the public domain. The skepticism is even more understandable and justified when one considers the apparent irony of the United States and other Western countries insisting on L&Es in the TK and TCEs context when the same countries have worked tirelessly over decades to prevent a minimum set of L&Es to copyright protection from being recognized in another WIPO committee at the expense of the public interest.[140] The same countries pushing for L&Es at the WIPO IGC are at

136. *See* Chander & Sunder, *supra* note 119, at 1332–38; Okediji, *supra* note 134, at 146.

137. *See, e.g.*, Chander & Sunder, *supra* note 119, at 1334 ("[T]he increasingly binary tenor of current intellectual property debates—in which we must choose either intellectual property or the public domain—obscures other important interests, options, critiques, and claims for justice that are embedded in many new claims for property rights.").

138. *Id.* at 1345.

139. Oguamanam, *supra* note 134, at 311 ("[S]uspect champions of the public domain have been able to prosecute their new found interest insisting upon term limits for TK, and an open-ended list of exemptions to the protection of TK.").

140. *See, e.g.*, Secretariat, WIPO SCCR, *Report on Regional Seminars and International Conference on Limitations and Exceptions*, at 65–66, WIPO Doc. SCCR/40/2 (Sept. 15, 2020) (delegates

the same time in another WIPO committee[141] pushing against L&Es, including L&Es for teaching, learning, research, preservation, and uses in libraries, archives, and museums. Therefore, it is hard to believe that at the IGC, these countries have reconstituted themselves into champions of L&Es on purely public interest grounds.

The question then is who benefits from recognizing and prescribing L&Es in legal instruments on TK and TCEs? Put differently, are L&Es intended to benefit Indigenous peoples, or are they simply another mechanism to continue the ongoing undue exploitation of TK and TCEs that are vital to the economic, cultural, and spiritual well-being of the communities that produce and steward them? One must be cognizant of the fact that while L&Es in the context of copyrights and patents may transfer some power from the powerful (large publishing corporations and pharmaceutical giants) to empower the powerless (the poor, linguistic minorities, persons with disabilities, and the sick), the opposite may be true in the TK and TCEs context. L&Es in the TK context could mean that power will be taken from historically disempowered and vulnerable Indigenous peoples and their communities and delivered to powerful agricultural and pharmaceutical giants to subsidize their costs of innovation in the hope (but not with the obligation) that the marginalized public will benefit from such subsidy. Large agricultural and pharmaceutical companies, not members of the public, are the main beneficiaries of the current international IP regime, which lacks obligations to protect Indigenous interests in TK and TCEs.[142] Legal accommodations like conventional provisions on L&Es will likely continue to primarily benefit multinational companies, with minimal positive impact for the general public and potential negative consequences for Indigenous peoples.

Attention must be given to the possibility that L&Es can be used to take away wealth from Indigenous peoples and their communities. For instance, exceptions may be used by persons who are better able to commercialize Indigenous arts and make them available at low prices to force Indigenous peoples out of business. At the same time, L&Es might be used to privilege conventional IP-driven innovation as the ultimate objective of the international IP legal order and subordinate the interests of Indigenous peoples and communities to the exploitative use of TK and TCEs by large and multinational corporations.

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from the United States and the United Kingdom pushing against any binding international norm-setting activities in the area of copyright limitations and exceptions).

141. *See Standing Committee on Copyright and Related Rights*, WIPO, https://www.wipo.int/policy/en/sccr/ [https://perma.cc/2H3A-HS7N] (last visited June 16, 2025) (for the positions of Western Countries on L&Es on copyright in the Standing Committee on Copyright and Related Rights).

142. *See* Chander & Sunder, *supra* note 119, at 1353.

While acknowledging that the promotion of L&Es may be a veiled attempt by Western countries to limit Indigenous rights, it is equally important to understand that L&Es could entrench the misuse of TK and TCEs by outsiders.[143] Since L&Es may legitimize misuse of TK and TCEs—uses contrary to customary laws and knowledge governance protocols of Indigenous communities—it is important to understand the specific harms that could be inflicted on Indigenous communities when TK and TCEs are misused. Professor Okediji identified at least three ways in which the misuse of TK can adversely impact Indigenous communities: "relationally, by weakening the social bonds between Indigenous persons that are founded on such knowledge; collectively, by introducing instability into a group; and developmentally, by attacking the conditions for future knowledge production."[144]

The potential for L&Es to legitimize the misuse of TK and TCEs, leading to harms that can transcend the economic and strike at the core of Indigenous identity and culture—affecting the stability, sustenance, and flourishing of Indigenous communities—distinguishes TK and TCEs from other IP contexts where economic harms are the primary concern.[145] L&Es framework for TK and TCEs must consider potential economic harms to Indigenous peoples as well as non-economic harms to the culture, identity, and knowledge governance systems. Furthermore, the risk of L&Es being used to exploit Indigenous peoples necessitates a unique approach that addresses power imbalances and potential weaponization. Without a tailored approach, L&Es can severely harm Indigenous communities.

C. Pursue an Indigenized Framework of Limitations and Exceptions

Despite the foregoing discussion, a framework allowing "others" and "strangers" to access and use TK and TCEs under certain conditions could offer genuine public interest benefits, including downstream advantages for Indigenous

143. Anderson, *supra* note 132, at 9–16 (describing examples of misuse of traditional knowledge and traditional cultural expressions).

144. Okediji, *supra* note 1, at 86; *see also* Okediji, *supra* note 133, at 472–73 (arguing that emotional, spiritual, cultural, and economic harms often result from the violations of strongly held beliefs by Indigenous peoples that sometimes occur in the course of access and use of their TK and TCEs by others).

145. For instance, during the last statutory review of the Canadian Copyright Act, the collective society representing authors argued strongly for the removal of fair dealing for educational purposes because it was economically harmful to authors. Access Copyright, Access Copyright's Submission to the Standing Committee on Industry, Science and Technology for the Statutory Review of the Copyright Act 4–6 (2018), http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9921730/br-external/AccessCopyright-e.pdf [https://perma.cc/U78R-2PM5]; *see also* House of Commons Canada, Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology, 55–56 (June 2019).

communities and other marginalized groups. For example, shared TK on a plant's health benefits could lead to novel medicinal cures and treatments and alleviate suffering beyond the TK custodians' community. The L&Es framework can facilitate this and other positive outcomes. Unlike the concept of the public domain, L&Es do not impair the claim to property status of TK and TCEs.[146] Further, when L&Es are defined and used with the involvement of Indigenous peoples, the concern of misuse and harm to non-property interests of Indigenous peoples could be addressed effectively. Consequently, while the framework of L&Es may bear frightening similarities to the concept of the public domain, the former is more amenable to structural redesigns at national and international levels that could be beneficial for Indigenous peoples and "others." As Professor Okediji aptly notes, "L&Es offer a workable normative space conducive to both entitlement rights and valid welfare considerations that may extend beyond the boundaries of the Indigenous group and local community."[147]

To ensure that L&Es protect Indigenous interests and enhance the use of TK and TCEs for human flourishing, the design of L&Es framework in any *sui generis* system for TK and TCEs must meaningfully involve Indigenous peoples. It is wrong to assume that Indigenous peoples do not want to share the benefits of their TK for the betterment of humanity.[148] Sharing with non-Indigenous peoples is not alien to Indigenous communities.[149] However, access without stewardship and respect for customs and traditions contradicts their knowledge governance practices.[150] Stewardship of TK and TCEs requires delicately balancing knowledge maintenance with use or dissemination. Stewardship of knowledge does not always mean sharing; it can be counter-sharing and, in such situations, should trump sharing and making TK and TCEs available.[151] Like Western knowledge management systems that protect confidential information, Indigenous peoples recognize that not all their knowledge is meant for everyone.[152]

While Indigenous peoples may be opposed to the sharing or commercialization of certain TK and TCEs because they consider them sacred or secret and, therefore, resist a framework of L&Es that permit third parties to use such TK and TCEs, not all TK and TCEs are considered sacred or non-shareable. The Mataatua Declaration on Cultural and Intellectual Property Rights of

146. Okediji, *supra* note 121, at 15.

147. *Id.*

148. J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 Marq. Intell. Prop. L. Rev. 147, 182 (2011).

149. *Id.*

150. Okediji, *supra* note 133, at 471.

151. For example, the stewardship of a sacred song that is key to the cultural and spiritual integrity of an Indigenous community could necessitate not sharing that song with people outside that community to prevent spiritual harms and cultural disintegration. *See id.* at 472.

152. Hughes, *supra* note 119, at 1253.

Indigenous Peoples, adopted at the first international conference on the culture and IP rights of Indigenous peoples, urges us to recognize that Indigenous peoples "are willing to offer it [their TK and TCEs] to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community."[153] In the same vein, commenting on the research exception in the draft TK and TCEs instruments, Indigenous experts noted that "Indigenous Peoples support scientific research and often contribute to research in different fields of knowledge. But firstly, research using TK and TCEs should only be carried out with the FPIC [free, prior and informed consent] of the relevant Indigenous Peoples."[154] It is, therefore, not as if Indigenous peoples are opposed to socially beneficial uses of their TK and TCEs for persons outside their communities; they are concerned with being "burnt" again.

A *sui generis* system for TK and TCEs should serve as a reconciliation tool to address the misappropriation of Indigenous peoples' TK and TCEs without their consent and in violation of their laws and customs. Two major objectives of a framework of L&Es in the context of TK and TCEs must be (i) ensuring the free, prior, and informed consent of Indigenous peoples is obtained; and (ii) protecting the cultures and knowledge governance systems of Indigenous peoples from violation. In Indigenous communities, "the process of accessing knowledge is negotiated under a delicate, complex, and layered system."[155] This knowledge governance system must not be bypassed or significantly compromised when creating L&Es. We must be prepared to move from a purely Eurocentric concept of sharing and embrace an inclusive and multicultural jurisprudence of knowledge governance, particularly in the context of TK and TCEs.

Indigenous peoples, under their customary laws, acquire rights to use TK and TCEs from their Creator and ancestors, along with obligations to preserve the sacred and secret aspects of TK and TCEs, which may be tied to their spiritual and cultural identity.[156] A *sui generis* system for protecting TK and TCEs should safeguard both the rights and obligations of Indigenous peoples. Therefore, a framework of L&Es specific to TK and TCEs that grants access and use rights or privileges over Indigenous peoples' TK and TCEs must also impose the obligations governing Indigenous peoples' use of TK and TCEs. This could involve requiring respect for the laws, traditions, and customs of the Indigenous custodians in certain uses of TK and TCEs by outsiders.

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153. Comm. on Hum. Rts. Sub-Comm. of Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/AC.4/1993/CRP.5 (June 1993).

154. *Report of Indigenous Expert Workshop*, *supra* note 103, at Annex I, 7.

155. Oguamanam, *supra* note 134, at 311.

156. *Id.* at 312–13.

A framework for L&Es must, therefore, avoid allowing access to and use of TK and TCEs without the free, prior, and informed consent of Indigenous peoples or in violation of their laws and customs. Otherwise, such a framework will contravene the United Nations Declaration on the Rights of Indigenous Peoples[157] and could further harm Indigenous peoples.

The foregoing analysis necessitates having an Indigenized framework of L&Es for TK and TCEs. In expressing the displeasure of the Indigenous caucus at the IGC toward the specification of robust L&Es in an international instrument on TK and TCEs, Hardison noted that:

> We believe that much of this article has been made unworkable by the massive loading with *unqualified exceptions and limitations* that undermine any protection [of TK]. Rights to traditional knowledge extend far outside the intellectual property context, and *the cultural issues involved cannot be adequately addressed with standard exceptions and limitations*.[158]

Designing an Indigenized L&Es framework for TK and TCEs must begin with meaningful consultation processes both nationally and internationally. Indigenous peoples must be centrally involved in developing an appropriate L&Es framework for the access and use of their TK and TCEs. While some of the L&Es provisions in the draft WIPO TK and TCEs instruments state that national discretion regarding the adoption of L&Es should be exercised in consultation, or involvement, with Indigenous peoples, in some cases, it is qualified with "where applicable," leaving it to the discretion of states to determine when to engage in consultations.[159] Such a qualification, which opens the interests and concerns of Indigenous peoples to possible dismissal and neglect by formal state entities, must be avoided.

Furthermore, merely stating that Indigenous peoples should be consulted is insufficient, as states may pay lip service to consultations. There must be a real and good faith commitment to meaningful consultations. Decisions and normative actions regarding L&Es must be based on information obtained from Indigenous peoples through deliberate formal consultation processes. Put differently, there must be meaningful consultations with Indigenous peoples (that is,

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157. G.A. Res. 61/295 art. 11(2), United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) ("States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.").

158. P. Hardison, *Response to WIPO Indigenous Panel at Outstanding/Issues*, *in* IGC Draft Articles on the Protection of Traditional Knowledge: Indigenous Peoples' and Local Communities' Perspectives, 32nd Session of WPI-IGC (2016), *as cited in* Oguamanam, *supra* note 134, at 317 (emphasis added).

159. *TK Draft Articles*, *supra* note 86, art. 9 [Facilitators' Alt & Alt 1]; *TCEs Draft Articles*, *supra* note 86, art. 7 [Facilitators' Alt & Alt 1].

co-equal consultations that respect the right of Indigenous peoples to self-determination) and genuine accommodation of their interests in the adoption of L&Es.

As noted by Hardison (see above), one of the issues with the specific L&Es provisions in the draft WIPO instruments on TK and TCEs is that they were merely unloaded into the text without consultation with Indigenous peoples.[160] Consultation with Indigenous peoples and accommodation of their property and non-property interests must not be limited to the process of devising new L&Es at the national level. Instead, the determination of the list of specific optional and mandatory L&Es in international TK and TCEs instruments must also involve consultation and accommodation.

We must accept and respect frameworks outside of the contemporary legal systems through which Indigenous communities make decisions regarding knowledge dissemination and use. According to Anderson, "[I]ndigenous peoples are asking for their cultural systems and ways of governing knowledge access and use to be recognized as legitimate, and to be respected as custodians/owners/nurturers of knowledge that is valuable within and beyond [I]ndigenous contexts."[161] Consultation with Indigenous peoples based on respect for the distinctive character and inherent worth of Indigenous cultures and knowledge systems may lead to practical pathways for developing an L&Es framework that meets the expectations and needs of Indigenous communities while enhancing access and use of TK and TCEs beyond those communities for human flourishing.

Taubman argues that respectful dialogues with Indigenous communities over the conditions of access and use of TK and TCEs may lead to the recognition of certain principles that are shared at a fundamental level between Western and Indigenous legal systems.[162] Some of these principles include:

> (1) according due respect and recognition for true origins and sources (a fundamental moral rights idea); (2) precluding unjust enrichment and the inequitable misappropriation or misuse of elements of knowledge, expressions, and signs in conflict with the legitimate entitlements of others to set the terms of access and use of this material (ideas of intangible property rights blended with liability rules); and (3) notions of equity and balance in the positive-sum sharing of benefits from the application of knowledge (ideas of equity that transcend individual transactional outcomes and recall the shared interests in applying knowledge to address the common challenges identified in the SDGs [sustainable development goals], such as those concerning the environment, health, and adaptation to climate change).[163]

160. *TK Draft Articles*, *supra* note 86, art. 9 [Facilitators' Alt & Alt 1]; *TCEs Draft Articles*, *supra* note 86, art. 7 [Facilitators' Alt & Alt 1].

161. ANDERSON, *supra* note 132, at ii.

162. Antony Taubman, *New Dialogues, New Pathways: Reframing the Debate on Intellectual Property and Traditional Knowledge*, 58 WASHBURN L.J. 373, 397 (2019).

163. *Id.*

Ultimately, if we design the L&Es framework through the lens of Indigenous peoples and their knowledge governance systems, we will soon find that knowledge sharing for human welfare and protecting Indigenous interests in TK and TCEs can coexist. While some elements or categories of TK and TCEs may remain secret within Indigenous communities and outside the L&Es framework, there is likely a wealth of knowledge that Indigenous peoples already recognize or would agree merits sharing with third parties under prescribed conditions.

D. Create an International Benchmark Tailored to the Traditional Knowledge and Cultural Expressions Context

Current provisions on L&Es in the draft WIPO instruments on TK and TCEs,[164] and the IGC Chair's text on TK and TCEs,[165] suggest that leaving Member States to determine the scope of L&Es is one way of dealing with the issue of L&Es. In other words, rather than attempting to specify a list of L&Es that may or must be recognized, Member States would instead be allowed to exercise discretion on what L&Es should be adopted in national laws. While greater national discretion regarding the adoption of L&Es under international IP laws has been widely advocated,[166] it is necessary to exercise greater caution regarding national discretion over L&Es to TK and TCEs rights.

In a technical review of WIPO draft instruments on TK and TCEs undertaken on behalf of the UN Permanent Forum on Indigenous Issues, Anaya expressed concern that leaving it to national law to determine L&Es is "particularly problematic, as it leaves states with latitude to decide that certain traditional knowledge and cultural expressions should not be subject to protection at all."[167] The same concern was recently expressed by Indigenous experts.[168] To ensure that nations do not create L&Es that significantly harm Indigenous peoples or violate their knowledge governance systems, international legal instruments on TK and TCEs must include an appropriately constructed benchmark for the design of L&Es in national instruments. Whether or not an international

164. *TK Draft Articles*, *supra* note 86, art. 9; *TCEs Draft Articles*, *supra* note 86, art. 7.

165. Lilyclaire Bellamy (IGC Chair), WIPO IGC, Forty-Sixth Session, *Non-Paper: Chair's Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions (First Draft),* at 14, WIPO Doc. WIPO/GRTKF/IC/46/CHAIRS TEXT (Feb. 21, 2023).

166. *See* Geiger et al., *supra* note 59.

167. James Anaya, WIPO IGC, Twenty-Ninth Session, *Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, at Annex, 6, WIPO Doc. WIPO/GRTKF/IC/29/INF/10 (Jan. 11, 2016).

168. *Report of Indigenous Expert Workshop*, *supra* note 103, at Annex I, 7.

instrument on TK and TCEs contains specific L&Es, it should contain a benchmark against which national L&Es may be measured in the interest of Indigenous peoples. This is especially important when bearing in mind that, unlike other groups that are primary beneficiaries of IP instruments, Indigenous peoples are marginalized and sometimes face oppression from their national (who are, at times, colonial) governments.

As discussed, there is a prevailing benchmark for the design of L&Es in international IP instruments—the three-step test. However, in conventional IP contexts, the three-step test has been widely criticized for curtailing national sovereignty to tailor IP rules to local needs and development priorities.[169] A relaxed three-step test is desirable in conventional IP contexts[170] but may be misused by countries not keen on strengthening TK and TCEs protection. These countries may introduce L&Es without involving Indigenous communities in their territories, thereby undermining the rigorously negotiated entitlements of Indigenous peoples under international TK and TCEs instruments. Conversely, a more restrictive three-step test in international TK and TCEs instruments may backfire in other international IP contexts where developing countries oppose restrictive interpretations of existing three-step test provisions.[171] Nonetheless, current drafts of international TK and TCEs instruments contain iterations of the three-step test.[172]

The *sui generis* nature of TK and TCEs protection requires caution in transplanting the three-step test from the TRIPS Agreement and other IP treaties. An Indigenized approach to L&Es may involve adopting a benchmark for L&Es that is disconnected from the conventional three-step test. Concerns arise with aspects of the TRIPS' three-step test, such as allowing Member States to consider the legitimate interests of third parties,[173] which may include historically exploitative groups. Could these "legitimate interests of third parties" trump the legitimate interests of Indigenous peoples, and if so, in what circumstances?

The conventional three-step test language could be avoided, as it is not essential for preventing the misuse of L&Es to undermine Indigenous peoples' rights. Insisting on this language may unduly constrain delegates at the IGC and limit the flexibility needed for a *sui generis* IP regime for TK and TCEs. Instead, safeguard provisions could diverge from the conventional three-step test by adopting a new benchmark or modifying the language of the standard three-step test to better fit the TK and TCEs context. This new or modified

169. *See* Geiger et al., *supra* note 59.

170. *See* Peter K. Yu, *WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 57 AKRON L. REV. 277, 290–91 (2025).

171. *Id.* at 290.

172. *TK Draft Articles*, *supra* note 86, art. 9; *TCEs Draft Articles*, *supra* note 86, art. 7.

173. TRIPS Agreement, *supra* note 49, art. 30.

benchmark should include consultation and accommodation,[174] as well as free, prior, and informed consent,[175] prioritizing the agency, customs, and traditions of Indigenous peoples in the design and adoption of L&Es in national TK and TCEs instruments.

Conclusion

The interests of Indigenous peoples must be prioritized in all international negotiations regarding IP protection over GRs, TK, and TCEs, including discussions on L&Es. If Indigenous interests had been properly centered in debates over the defensive protection of GRs through a mandatory disclosure requirement, the issue of L&Es might not have arisen or could have been quickly resolved. While the final decision was to exclude provisions on L&Es in the GRATK Treaty, prolonged contentions could have been avoided. However, this does not imply that L&Es are irrelevant in legal instruments protecting Indigenous peoples' knowledge and resources. In right-granting instruments like those for TK and TCEs, considering L&Es is both appropriate and necessary. Nevertheless, we must not overlook the extractive and exploitative mentality central to accessing Indigenous knowledge and culture. The historical and ongoing dispossession of Indigenous peoples of their TK and TCEs and the misuse of TK and TCEs, harming their economic, cultural, and spiritual interests, must be front and center in discussions over access and use of TK and TCEs.

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174. In Canada, when the government contemplates decisions or actions that might adversely impact claimed or established Indigenous rights, it has a duty to consult and, where appropriate, accommodate Indigenous peoples. The duty to consult and accommodate is based on judicial interpretation of the government's obligations under Canada's constitution, the "honor of the crown" (government at all levels), and the unique relationship between the government and Indigenous Peoples. The jurisprudence of Canadian courts is that "the duty to consult and accommodate is part of a process of fair dealing and reconciliation … [and] this process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples." *See* Haida Nation v. B.C. (Minister of Forests) [2004] 3 S.C.R. 511, 525–28 (Can.).

175. The "free, prior and informed consent" principle is a prescribed standard for accessing and using the "cultural, intellectual, religious and spiritual property" under the United Nations Declaration on the Rights of Indigenous Peoples. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 157, art. 11(2). The Nagoya Protocol also requires State parties to "take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of [I]ndigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources." 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 art. 6(2), Oct. 29, 2010, 3008 U.N.T.S. 3 (supplementing the Convention on Biological Diversity, June 5, 1992–June 4, 1993, 1760 U.N.T.S. 79).

The unique experiences of Indigenous peoples make the rationales for the demand for legal protection over TK and TCEs different from conventional IP regimes. This Article contends that the distinct rationales for TK and TCEs protection must be central in debates about access and use terms. The L&Es framework must consider the potential harms to Indigenous peoples from the misuse of TK and TCEs. In the debates around "imposing" limits on Indigenous peoples' rights, we must consider the power dynamics between Indigenous peoples and state governments (sometimes colonialists) and between Indigenous peoples and users of TK and TCEs (sometimes exploiters). These unequal power relationships necessitate granting Indigenous peoples meaningful agency over their resources, including involving them in creating an Indigenized L&Es framework that protects their laws, customs, and traditions while facilitating the use of TK and TCEs for human flourishing.