



# The Protection of Traditional Knowledge and Traditional Cultural Expressions – with a Special Focus on the “Traditional” in Iranian Handmade Carpets

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# Protecting Iranian handmade carpets

- 1. Locate precisely the protectable “intellectual properties” embodied in and/or associated with Iranian handmade carpets, and then
- 2. Identify the means to establish and enforce rights in them, nationally and internationally
- Options:
  - conventional IP systems
  - non-IP systems (e.g., CBD, 1992; UNESCO Conventions 2003 and 2005)
  - nascent, inchoate IP systems for “traditional knowledge” and “traditional cultural expressions”

# Value and importance

- Indigenous peoples, local communities and nations claim that TK and TCEs are **valuable and important** for:
  - biodiversity conservation
  - food security
  - environmental management
  - climate change mitigation
  - sustainable development
  - primary healthcare
  - cultural identity and social cohesion
  - cultural diversity
  - employment, trade and income

# Threats

- **The erosion of local knowledge systems: threats to their viability and maintenance:**
  - rejection of traditions by younger generations: the pull of modernity
  - lack of respect for indigenous knowledge: IKS trivialised as “unscientific”
  - acculturation and diffusion: migration, urbanization
  - unauthorized commercial exploitation: challenges posed by new technologies

# Aspirations

- Indigenous peoples, local communities and many States call for:
  - **recognition, safeguarding and nurturing** of TK and TCEs as contribution to sustainable development
  - **promotion** of the value and utility of TK and TCEs
  - **reciprocity** among knowledge providers and knowledge users
  - **rewarding** of custodians of local knowledge systems as they conserve and adapt them to meet contemporary needs
  - the '**protection**' of TK and TCEs against unauthorized third party access and use

- What has this to do with intellectual property (IP)?
  - does IP offer the right incentives to meet the needs of TK and TCE holders?
- What do conventional IP systems say about TK and TCEs?
  - what does 'IP protection' mean?
- Which options are there for recognizing and protecting TK and TCEs as IP?
  - update on negotiations in the WIPO IGC

# Intellectual property and TK/TCEs – a conceptual and ethical mismatch?

*“A song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory”*

*(Daes, 1995)*

## The great PROTECTION racket

Imposing IPRs on traditional knowledge



13

GRAIN

Over the past three years, the World the Convention on Biological diversity (CBD), the

**WIPO**  
WORLD  
INTELLECTUAL PROPERTY  
ORGANIZATION

“Intellectual property” – creations and innovations of the human mind

Intellectual property “protection” – provides creators and innovators with possibility to regulate access to and use of their works if they so wish

- IP: proprietary (eg., exclusive rights) and non-proprietary rights (eg., moral rights, right to compensation)
- Balance and proportionality: IP rights do not provide perfect control: limitations and exceptions/the public domain
- IP “protection” is not equivalent to “preservation/safeguarding”
- The world of IP is in transformation – e.g. a2k movement



*Article 6*

*Exhaustion*

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

*Article 7*

*Objectives*

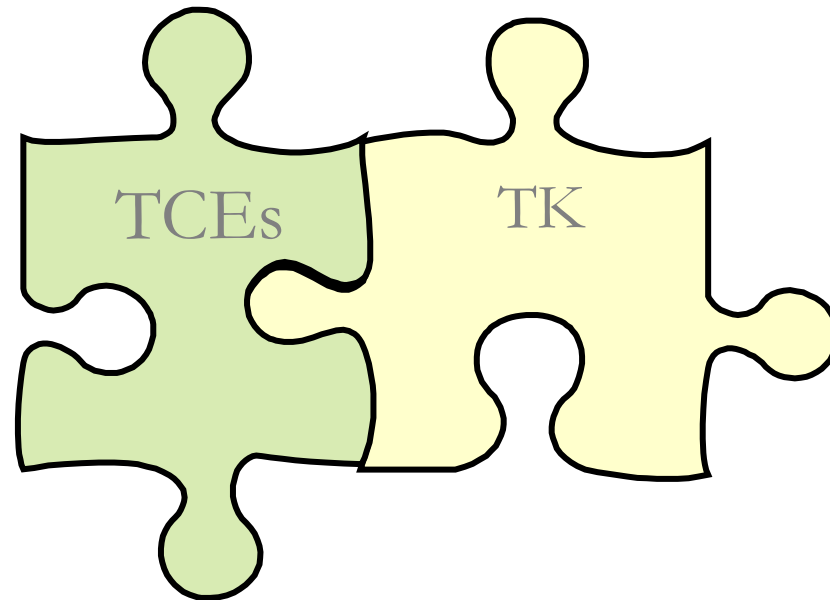
The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

*Article 8*

*Principles*

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance

“Traditional knowledge” (TK) and “traditional cultural expressions” (TCEs)



# What do IP law and practice say about TK

- Patents available for any inventions in all fields of technology provided they are new, involve an inventive step and are capable of industrial application (certain exclusions possible)
- International IP law largely silent on TK
  - “traditional” knowledge regarded as “public domain” from perspective of IP system
  - “TK-based innovations” may be protected as inventions; TK may also be protected as confidential information and against unfair competition
- A few *sui generis* mechanisms and laws present in national and regional legal systems: little experience with them
- Several “misappropriation” cases; little empirical study of their effects

# What do IP law and practice say about TCEs

- “Traditional” cultural expressions largely regarded as “public domain”
- Yet, pockets of protection available in international IP law
- Contemporary versions are protectable under copyright and related rights law
- Many *sui generis* mechanisms and systems
- Several “misappropriation” cases; little empirical study of their effects

What do we mean by “protection” of TK/TCEs?

**Positive** protection  
(an IP right in TK/TCEs, to authorize or prevent use)

**Defensive** protection  
(avoidance of IP rights in TK/TCEs – eg., TKDL)

**Setting IP-related objectives**

- what do you want to stop others doing?
- what do you want TK/TCE holders to be able to do?

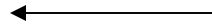
Unauthorized commercial use, distortion, “passing off”, no attribution, disclosure of secret TK/TCEs

Ownership, PIC, benefit-sharing, prevention,

What options are there to achieve these objectives?

What options are there for attaining IP objectives?

Existing IP law  
Adapted or new (sui generis) IP law  
Customary law, and/or  
Non-IP law



1. Policy/legislative

Example: can existing IP systems protect TK and/or TCEs, directly or indirectly?

- copyright and patent protection for **contemporary** creation and innovation based on TK
- copyright for **unpublished works of unknown authors** (Berne, 15.4)
- related rights protection of **recordings** of cultural expressions and for “**performers of expressions of folklore**” (WIPO Performances and Phonograms Treaty, 1996)
- databases and compilations of TK can be protected
- **collective trademarks/GIs/appellations of origin** can protect TK/TCE products (eg., foods, agricultural products, crafts) against passing off – indirect protection
- protection of **confidential information** for secret TK/TCEs
- protection against “unfair competition”

What options are there for attaining IP objectives?

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1. Policy/legislative



Information systems:  
databases/inventories

2. Infrastructure



Guidelines and protocols  
Contracts/licensing  
Dispute resolution  
procedures

3. Practical tools



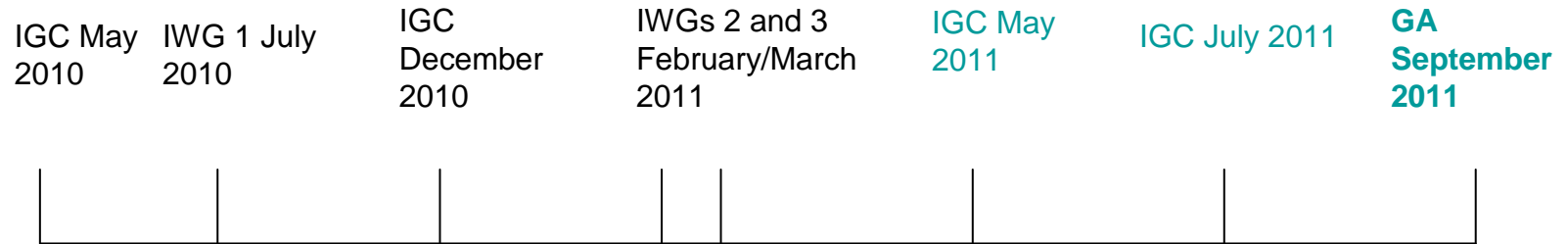
# WIPO Intergovernmental Committee

- Established in 2000; met for the first time in April 2001
- IGC was preceded by several years of fact-finding, consultation
- IGC: Member States, indigenous and local communities, business, other NGOs
- Prevailing view is that a *sui generis* system is needed to protect TK and/or TCEs

# New IGC mandate 2010-2011

- text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs
- a clearly defined work program. . . four sessions of the IGC and three inter-sessional working groups, in the 2010-2011 biennium
- build on the existing work of the IGC . . . use all WIPO working documents, including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A
- the Committee is requested to submit to the 2011 General Assembly the text of an international legal instrument (or instruments). The General Assembly in 2011 will decide on convening a Diplomatic Conference
- “without prejudice to the work pursued in other fora”
- “bearing in mind the Development Agenda recommendations”

# Program



# Key policy questions

- Why?
- What?
- Who?
- Which model best promotes creativity and innovation, spurs economic growth, maintains a robust public domain and respects the interests of indigenous and local communities as well as of the broader public?
- Such a model should complement and not conflict with protection already available under conventional IP systems, as well as under non-IP systems.

# Applying the IGC to Iranian handmade carpets

- Production methods, know-how, weaving skills, knots – “traditional” knowledge?
- Designs, motifs, styles, colours and other artistic expressions – “traditional” cultural expressions?
- “Persia” and other indications of source – “traditional” cultural expressions?
- Wools, fibres, plants used for dyes – genetic resources?

# I. The protection of “traditional knowledge” (WIPO/GRTKF/IC/18/5)

- Objectives
- General guiding principles
- Substantive articles

1. Subject Matter of Protection
2. Beneficiaries of Protection
3. Protection against Misappropriation
4. Prior Informed Consent, Fair and Equitable Benefit-Sharing, and Recognition of Knowledge Holders
5. Administration and Enforcement of Protection
6. Exceptions and Limitations
7. Duration of Protection
8. Formalities
9. Transitional Measures
10. Consistency with the General Legal Framework
11. International and Regional Protection

# Subject matter of protection: what is TK?

- Draft Article 1

- Two parts:

- general nature of TK (articles 1(1) and 1(2))

- which qualities TK should have in order to be protected (article 1(3))

Protection [should] shall be extended [at least] to that traditional knowledge which [is] satisfies any of the following.¶

¶

(i) → [Generated, constituted, developed, preserved and transmitted in a traditional and intergenerational context; or¶

¶

(ii) → [[distinctively] associated with] customarily recognized as belonging to a traditional or indigenous community, local community, [or] people or ethnic group which preserves and transmits it between generations; [and] or ] generated, preserved and constituted in a traditional context and shared within a community or collectively and usually transmitted from one generation to another; and/or¶

¶

(iii) → [integral to [the cultural identity of]] [a nation and an indigenous] a local or traditional community; [or] cultural identity of people or ethnic group which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or applicable national laws; and¶

¶

(iv) → [has not been made public;] [has not been made widely and voluntarily known outside that community]¶

¶

(v) → contained in codified knowledge systems;¶

¶

(vi) → passed through generations which may not be necessarily confined to



# Beneficiaries and rightsholders

- Draft Article 2
  - Close link with Draft Article 1
- Two aspects:
  - Identification of beneficiaries
  - Choice of term to describe them
- International vs. national vs. customary laws

¶

¶

Protection of traditional knowledge should benefit the **communities** who generate, **protect**, preserve and transmit the knowledge in a traditional and intergenerational context, who are [associated with it] and who identify with it in accordance with Article 1(3). Protection should accordingly benefit the **indigenous and traditional or local communities** themselves that hold traditional knowledge in this manner, [as well as recognized **individuals** within these communities and peoples] as well as **individuals** within the communities who are recognized under customary laws, practices and protocols to hold the knowledge for the community, or who are designated as trustees of such knowledge by appropriate traditional processes, customs or institutions/, taking into account in particular those individuals who act as the custodians of that knowledge or who are given special recognition within these communities and peoples. Entitlement to the benefits of protection should, [as far as possible and appropriate], [take account of] **be according to the customary protocols, understandings, laws and practices of these communities and peoples.** ¶

¶

For codified traditional knowledge, either in the form of ancient scriptures or digital libraries of public texts, or if the knowledge is not confined to a community but is generally used, the relevant legislation of Member States shall provide for identification of the beneficiary. ¶

¶

## II. The protection of “traditional cultural expressions” WIPO/GRTKF/IC/18/4 Rev.

- Objectives
- General guiding principles
- Substantive articles

1. Subject Matter of Protection
2. Beneficiaries of Protection
3. Scope of Protection
4. Collective Management of Rights
5. Exceptions and Limitations
6. Term of Protection
7. Formalities
8. Sanctions, Remedies and Exercise of Rights
9. Transitional Measures
10. Relationship with IP Protection and other forms of Protection, Preservation and Promotion
11. National Treatment

# Subject matter of protection: what are TCEs?

- Draft Article 1

- Two parts:

- general nature of TCEs (articles 1(1) and 1(2))

- which qualities TCEs should have in order to be protected (article 1(3))

ARTICLE 1

SUBJECT MATTER OF PROTECTION

1. → "Traditional cultural expressions" are any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from generation to generation], of tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2 including, but not limited to:
- (a) → phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];
  - (b) → [musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals];
  - (c) → expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
  - (d) → tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms], and sacred places.

¶

# Formalities

- Draft Article 7 of 18/4 Rev.
- Options:
  - No formalities
  - Optional registration/documentation
  - Mandatory registration/documentation
    - Registration can be ‘constitutive’ or ‘declaratory’

ARTICLE 7  
FORMALITIES

As a general principle, the protection of traditional cultural expressions shall not be subject to any formality.

# Save the date!

- International Technical Symposium on the Documentation and Registration of TK and TCEs

- Muscat, Oman

- June 26 to 28, 2011



# Some of the key questions, also for Iranian handmade carpets

## ■ **Definitional issues**

- What is “traditional” knowledge? What are “traditional” cultural expressions?
- Who should be the beneficiaries of new rights in TK/TCEs?

## ■ **Technical issues**

- How would special protection for TK/TCEs interact with protection available under existing IP?
- How should publicly available TK/TCEs and transboundary (“shared”) TK/TCEs be addressed?

## ■ **Operational issues**

- What role, if any, should registration/documentation play in the protection of TK/TCEs?
- How would new rights be managed and enforced?

- IGC 18: May 9 to 13, 2011
- IGC 19: July 18 to 22, 2011
- WIPO General Assembly: September 2011

# Concluding remarks

- An **historic opportunity** for intellectual property
  - First normative process in IP initiated and led by developing countries
  - At the cutting edge of new approaches to best models for generation and regulation of knowledge
  - New international legal instrument(s) would represent a major normative shift in IP
- IGC = 100% Pure Development Agenda



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END