



COVERSHEET

Minister	Hon Nanaia Mahuta Hon Dr Duncan Webb	Portfolio	Associate Māori Development Commerce and Consumer Affairs
Title of Cabinet Paper	Revised Negotiating Mandate for the Development of International Legal Instruments Protecting Traditional Knowledge and Cultural Expressions at the World Intellectual Property Organization	Date to be published	4 August 2023

List of documents that have been proactively released

Date	Title	Author
May 2023	Revised Negotiating Mandate for the Development of International Legal Instruments Protecting Traditional Knowledge and Cultural Expressions at the World Intellectual Property Organization	Office of Associate Minister for Māori Affairs; Office of Minister of Commerce and Consumer Affairs
31 May 2023	Development of International Legal Instruments Protecting Traditional Knowledge and Cultural Expressions at the World Intellectual Property Organization: Revised Negotiating Mandate DEV-23-MIN-101 Minute	Cabinet Office

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's and TPK's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of Negotiations and Confidential advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Office of the Associate Minister for Māori Development

Cabinet Economic Development Committee

Revised Negotiating Mandate for the Development of International Legal Instruments Protecting Traditional Knowledge and Cultural Expressions at the World Intellectual Property Organization

Proposal

- 1 This paper seeks agreement to update the 2010 interim negotiating mandate for two international legal instruments protecting traditional knowledge (**TK**) and traditional cultural expressions (**TCEs**). These instruments are being developed within a specialised agency of the United Nations: the World Intellectual Property Organisation (**WIPO**) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (**IGC**).
- 2 The next IGC session is scheduled to be held on 5 – 9 June 2023. Official delegates from Aotearoa New Zealand will attend.

Relation to government priorities

- 3 The Government identified a commitment to progressing Te Tumu mō Te Pae Tawhiti (**Te Pae Tawhiti**) as part of the Labour Māori Manifesto 2020. Te Pae Tawhiti, the government's approach to addressing issues raised in Wai 262, provides a significant opportunity for the Crown to partner with Māori to realise the benefits of te Tiriti in an economic, cultural and environmental sense.

Executive Summary

- 4 The WIPO IGC is negotiating on two draft international instruments for the protection of TK and TCEs. These instruments will potentially provide the international protections and recognition of indigenous TK and TCEs necessary to protect mātauranga Māori globally.
- 5 New Zealand officials have been negotiating on the basis of an interim mandate for IGC negotiations in the TK and TCEs space since 2010. This Ministerial mandate is high-level, and the decision to maintain it over the years was reflective of the slow movement of the IGC negotiations and in our domestic policy to address the issues raised in the Wai 262 inquiry.
- 6 Officials consider that an updated interim mandate at Cabinet level is needed to reflect the progression of the IGC negotiations and domestic policy in Aotearoa New Zealand over the past 13 years, including the introduction of te Tumu mō Te Pae Tawhiti, the all-of-government work programme related to issues raised in Wai 262.

- 7 As officials are due to attend the last mandated IGC session on TK and TCEs in early June 2023, it is important that the delegates are equipped to engage in a te Tiriti-principle based and up-to-date way.
- 8 A possible outcome of this IGC session may be to seek a further update to the interim mandate would be sought from Cabinet should a diplomatic conference be called on TK and TCEs texts under negotiation in the IGC.

Background

There is a need to protect mātauranga Māori from misuse and misappropriation and to enable Māori to advance and innovate mātauranga Māori globally.

- 9 The international intellectual property (IP) system and mechanisms in place are currently inadequate in protecting the rights and interests of Indigenous Peoples as traditional knowledge holders. The IP system works to create or grant exclusive rights over specific creations, for their individual creator or inventor. This does not align with the approach of collective guardianship or holding of knowledge seen in most Indigenous cultures and worldviews. Therefore, protection of Indigenous knowledge systems such as mātauranga Māori, is often excluded under current IP mechanisms.
- 10 Due to inadequate protection at an international scale, misuse of mātauranga Māori continues. Recent examples where mātauranga Māori has been misused internationally include the use of Haka in international car commercials and te reo Māori and tā moko designs being used in labelling of beer cans in Italy.
- 11 There is also a growing recognition of the economic benefits to Māori and Aotearoa New Zealand of leveraging traditional knowledge in international markets. The Institute of Public Administration New Zealand suggests small, advanced economies like Aotearoa New Zealand's can expand by exploring and pursuing areas of specialisation to support businesses with sustained competitive advantage in international markets.¹ The Productivity Commission found Māori businesses harnessing mātauranga Māori values deliver distinctive and specialised products that can present as significant assets in overseas markets.² The work of Lincoln University (2016 and 2017, as cited in New Zealand Productivity Commission, 2021) further pointed out the growing global interest in goods and services anchored in environmental sustainability and social responsibility, with consumers willing to pay premiums for these attributes.³
- 12 International legal protections and recognition of indigenous TK and TCEs are necessary to protect Aotearoa New Zealand's unique identity and to ensure Māori are active participants and global leaders in the development and use of mātauranga Māori. This will help ensure rangatiratanga and tikanga are upheld

¹ Crawford, R. (2021). Devolving power to tackle complex issues. *The Journal of Institute of Public Administration New Zealand*, 44(3), 4-5. https://ipanx.org.nz/Article?Action=View&Article_id=150337.

² New Zealand Productivity Commission. (2021). *New Zealand firms: Reaching for the frontier. Final report.* <https://www.productivity.govt.nz/inquiries/frontier-firms/>.

³ KPMG. (2017). *Māori Economy Investor Guide.* <https://www.mbie.govt.nz/dmsdocument/1051-maori-economy-investor-guide-pdf>.

internationally, and the understanding of te ao Māori globally and its role in the world is strengthened, which will have a flow on impact on the cultural and economic wellbeing of Māori and Aotearoa New Zealand domestically.

The WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is working towards draft instruments for the protection of Traditional Knowledge and Traditional Cultural Expressions

- 13 The IGC was established in 2001 and is the key international forum considering how the international IP system could better protect the rights and interests of Indigenous Peoples. Since 2009, the IGC's work has been focused on developing international instruments to ensure "balanced and effective protection" of genetic resources (**GR**), TK and TCEs.
- 14 In the Aotearoa New Zealand context, TK is comparable to mātauranga Māori. TCEs are akin to tangible or intangible expressions of mātauranga Māori, for example Haka, tā moko, waiata and more.
- 15 Aotearoa New Zealand has taken an active role in the IGC since its inception. It has therefore had good visibility and is well regarded by other member states. Many member states perceive Aotearoa New Zealand as a leader in the recognition of indigenous rights and interests, including in the IP system.
- 16 The IGC process is the precursor to the WIPO treaty making process. If WIPO members decide that the outcome of the IGC process should be a treaty and the draft texts being discussed by the IGC are sufficiently mature, WIPO will convene a Diplomatic Conference. This is when the formal negotiations will start, and countries will start to record their support or opposition to particular aspects of the draft documents.
- 17 Despite slow progress of the IGC over recent years, the decision of the 2022 WIPO General Assembly to call a Diplomatic Conference to conclude an International Legal Instrument for GRs has increased anticipation of a diplomatic conference being called on international instruments covering the protection of TK and TCEs.

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Te Tumu mō Te Pae Tawhiti

- 19 Te Tumu mō Te Pae Tawhiti (**Te Pae Tawhiti**) is a programme of mahi that sets the foundational architecture needed for Māori and the government to partner

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effectively to protect, promote and preserve mātauranga Māori and other taonga in an authentic way that is congruent with a tikanga approach.

- 20 Te Pae Tawhiti provides a significant opportunity for the Crown to partner with Māori to realise the benefits of te Tiriti o Waitangi in an economic, cultural and environmental sense. This includes components focussed on developing a **sui generis** (bespoke) intellectual property policy and legal system for mātauranga Māori and other taonga and using international levers, in particular, international instruments to protect mātauranga Māori and their taonga.
- 21 In 2022, Cabinet agreed to the refocussed work programme, Te Tumu mō Te Pae Tawhiti [CAB-22-MIN-0003 and MCR-22-MIN-0019 refers].

The current interim mandate

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- 25 The decision in 2019 to maintain the interim mandate reflected the slow progression of the IGC due to the difference in worldviews between various member states, and progress since the Waitangi Tribunal's report *Ko Aotearoa Tēnei* was released in 2011.


We propose an updated mandate that reflects Aotearoa New Zealand's progress in policy developments regarding the appropriate use and active protection of mātauranga Māori

- 26 Based on the progress of the IGC and advances in the development of domestic policies over the past 13 years, an updated interim mandate is needed for Aotearoa New Zealand to influence and engage more effectively on international instruments being negotiated at the IGC.

- 27 Recent progress of Te Pae Tawhiti towards developing domestic policy settings for approaches to the active protection and appropriate use of mātauranga, now gives greater certainty of the areas for potential alignment with the work of the IGC. An example of this is the development of a *sui generis* (bespoke) intellectual property policy and legal system in Aotearoa New Zealand for mātauranga Māori and other taonga, which is a main workstream of Te Pae Tawhiti. A revised and strengthened IGC mandate will ensure that Aotearoa New Zealand can effectively negotiate within Te Pae Tawhiti developments.
- 28 Additionally, the increased momentum in international activity on the protection and recognition of indigenous rights and interests, such as Aotearoa New Zealand's commitment to global biodiversity through the Convention on Biological Diversity COP-15 arrangement in December 2022 and the establishment of the Indigenous Collaboration Arrangements with Australia and Canada⁵, reaffirms the need for Aotearoa New Zealand to continue to participate in the international fora in an up-to-date and current way.
- 29 A further update to the interim mandate may be sought from Cabinet should a diplomatic conference, be called on texts under negotiation in the IGC.

The proposed interim mandate for the next IGC session and beyond

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⁵ An Indigenous Collaboration Arrangement (ICA) is a standalone bilateral arrangement aimed to promote economic, social and cultural advancement of Indigenous Peoples through relationship development, improved knowledge sharing, and stronger collaboration. New Zealand signed its first ICA with Australia in 2020 and then with Canada in 2022.

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Financial Implications

- 34 There are no financial implications for this paper. Participation of Aotearoa New Zealand in the IGC will continue to be met through existing Te Puni Kōkiri and Ministry of Business, Innovation and Employment baselines.

Legislative Implications

- 35 There are no legislative implications from the proposals in this paper. Legislative implications will be considered as part of any agreement to the international instruments.

Impact Analysis

- 36 A Regulatory Impact Statement and Climate Implications of Policy Assessment are not required for this paper.

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Human Rights

- 39 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, and the United Nations Declaration on the Rights of Indigenous Peoples.

Consultation

- 40 The Ministry of Business, Innovation and Employment and Te Puni Kōkiri have consulted with Te Arawhiti, Ministry of Foreign Affairs and Trade, Ministry for the Environment, Department of Conservation, Department of Internal Affairs, Statistics New Zealand, Ministry for Culture and Heritage, Ministry for Primary Industries on this Cabinet paper. The Department of Prime Minister and Cabinet and The Treasury have been informed.

Communications

- 41 No publicity will be undertaken for this decision.

Proactive Release


- 42 At this stage, our intention is to proactively release this Cabinet paper, with redactions as appropriate where there are international implications.

Recommendations


The Minister of Commerce and Consumer Affairs and Associate Minister for Māori Development recommend that the Committee:

- 1 **note** that New Zealand officials have been working off an interim Ministerial mandate in IGC discussions on the protection of Traditional knowledge (TK) and Traditional Cultural Expressions (TCEs) since 2010, awaiting domestic developments in response to Wai 262;
- 2 **note** that the Government's commitment to Te Tumu mō Te Pae Tawhiti in [CAB-22-MIN-0003 and MCR-22-MIN-0019] supports New Zealand's active participation in the development of an international instrument protecting TK and TCEs;
- 3 **note** that with the progress of the IGC and advances in domestic policies over the past 13 years, including the establishment of Te Tumu mō Te Pae Tawhiti, an updated interim mandate is needed for Aotearoa New Zealand officials to influence and engage more effectively based on te Tiriti principles on international instruments for the protection of TK and TCEs being negotiated at the IGC.

Negotiations



Negotiations



- 5 **note** a further update to the interim mandate would be sought from Cabinet should a diplomatic conference be called on TK and TCEs, texts under negotiation in the IGC.

Authorised for lodgement

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