

## ***Ad Hoc* Expert Group on Traditional Knowledge and Traditional Cultural Expressions**

**Geneva, March 17, 2019**

SUBSTANTIVE BACKGROUND NOTE

*Prepared by the International Bureau of WIPO*

1. The overall objective of the *ad hoc* Expert Group on traditional knowledge and traditional cultural expressions is, as indicated in the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”) and the Decisions of the Thirty-Seventh Session of the IGC (“IGC 37”) and the Thirty-Eighth Session of the IGC (“IGC 38”), to address specific legal, policy or technical issues. The results of the work will be reported to and further addressed by the IGC.

2. In accordance with the Decisions taken at IGCs 37 and 38, Member States, through the Regional Coordinators, were invited to suggest the specific issues to be considered by the *ad hoc* Expert Group. The IGC Chair and Vice-Chairs then identified a list of issues from the suggestions made by Member States and provided it to the Regional Coordinators for comments. On the basis of the above, the Chair and the Vice-Chairs have identified the list as follows:

“In relation to traditional knowledge and traditional cultural expressions,

1. Subject matter, including related definitions.
2. Scope of protection:
  - further consideration of a possible “tiered approach” (differentiated protection)
  - criteria for eligibility for protection
  - related definitions.”

3. This Substantive Background Note provides some background information on the list of issues, and proposes some questions and a task for the *ad hoc* Expert Group to consider. The Co-Chairs of the *ad hoc* Expert Group will provide further guidance on how these issues and questions will be addressed during the meeting. It is recalled that traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”) will also be addressed at IGCs 39 and 40.

### **Subject matter**

4. The first issue relating to subject matter which the *ad hoc* Expert Group is invited to discuss is the approach to defining subject matter. In a legal instrument, provisions on subject matter generally aim at delineating the *protectable* subject matter.

5. In the context of their discussions on subject matter, experts are invited to note that:

- Provisions on the subject matter of protection may include a definition or description of the subject matter itself, as well as substantive criteria which specify more precisely which TK/TCEs are protectable. Indeed, the subject matter in general may need to be distinguished from protectable subject matter;
- International IP standards often defer to the national level for determining the precise delineation of protectable subject matter. International instruments can range from providing a general and broad description of subject matter, to a set of criteria the subject matter should satisfy to be eligible for protection (in the IGC context, these are referred to as “eligibility criteria”), to no definition at all.

6. Questions the *ad hoc* Expert Group is invited to discuss include:

- Is it necessary for the instrument(s) to define “subject matter”?
- If so:
  - Should these definitions be in the Use of Terms articles, or in stand-alone articles?
  - What are the key qualifiers which define the subject matter, for example, “created, generated, expressed, developed and maintained by indigenous and local communities”, “directly linked with or integral to the social/cultural identity/heritage of indigenous and local communities”, “transmitted between or from generation to generation”, and “may be dynamic and evolving”?
  - What are the key qualifiers to describe TK and TCEs respectively, for example, TCEs “consist of any form of creative or spiritual/artistic and literary expression, tangible or intangible, or a combination thereof, such as actions<sup>1</sup>, materials<sup>2</sup>, music and sound<sup>3</sup>, or verbal forms<sup>4</sup>”, and TK “takes the form of know-how, skills, practices, teachings and learnings”?
- Should the instrument(s) distinguish between “subject matter” and “*protectable* subject matter”? If so, how? (which “eligibility criteria”?). What should be left to national laws?
- In considering the above questions it should be noted that a number of approaches have been proposed in the working documents relating to TK and TCE to establish the relationship/interface between defining the subject matter and determining the scope of moral and/or economic rights relating to TK and TCE, including limitations to any such rights. These include:
  - Linking the eligibility criteria to the definition of TK and TCEs and differentiating the scope of protection within the draft articles relating to “Scope of Protection” based on the diffusion of that knowledge and cultural expressions and the nature of their control and management within an identified indigenous or local community.
  - Establishing a specific definition for protected TK and TCEs which incorporates criteria for protection.
  - A combination of the above approaches.
- Is it necessary to define “traditional”? If so, how?
- Should the definition of protectable subject matter include a temporal component (such as that the TK or TCEs would have had to have existed for “not less than 50 years or a

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<sup>1</sup> Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.

<sup>2</sup> Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.

<sup>3</sup> Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.

<sup>4</sup> Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.

period of five generations”)?

- Are examples of TK and/or TCEs needed in the instrument?

### Scope of protection

7. The scope of protection seeks to determine which specific acts or omissions in respect of protectable TK and/or TCEs ought to be prohibited or prevented and/or which harms to TK and/or TCEs would IP-similar instruments on TK and TCEs seek to address?

8. The *ad hoc* Expert Group is invited to clarify:

- which is the appropriate approach: a rights-based approach, a measures-based approach or a combination of the two? In a *rights-based approach*, beneficiaries are granted rights which they can directly manage and enforce, and in a *measures-based approach*, Member States are enjoined to provide measures for the protection of TK and TCEs, which could include a wide range of legal and practical civil, administrative or criminal measures. Both approaches are reflected in existing international IP instruments; and,
- the flexibility necessary to allow the scope of protection to be determined at the national level.

9. The IGC has discussed for several years a so-called “tiered approach” (also referred to as “differentiated protection”), whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

10. In this regard, and with a view to testing the practicality and legal implications of a “tiered approach”, the *ad hoc* Expert Group is invited to:

- design a draft framework(s) that would reflect a tiered approach to TK and TCEs. The framework(s) could, for example, reflect economic, moral rights and/or rights to remuneration/compensation, and differentiate between different forms in which TK and TCEs may be found, such as secret, closely held and publicly available TK and TCEs.

### Useful resources

11. There are some useful resources available on the WIPO website which the *ad hoc* expert group may wish to use as reference materials, such as:

- Chair’s Information Note Prepared for IGC 39, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=429638](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=429638);
- WIPO/GRTKF/IC/39/6, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=426449](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=426449);
- WIPO/GRTKF/IC/39/7, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=426450](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=426450);
- WIPO/GRTKF/IC/17/INF/8, Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=149213](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=149213);

- WIPO/GRTKF/IC/17/INF/9, List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found,  
[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=147152](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=147152);
- Regional, National, Local and Community Experiences,  
[https://www.wipo.int/tk/en/resources/tk\\_experiences.html](https://www.wipo.int/tk/en/resources/tk_experiences.html);
- Lectures and presentations on the selected topics,  
[https://www.wipo.int/tk/en/resources/tk\\_experiences.html#4](https://www.wipo.int/tk/en/resources/tk_experiences.html#4).

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