

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

Geneva, December 4, 2022

SUBSTANTIVE BACKGROUND NOTE

Prepared by the International Bureau of WIPO

1. According to 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 Forty-Fourth Session of the IGC (“IGC 44”), the overall objective of the *ad hoc* expert group on traditional knowledge and traditional cultural expressions is to address specific legal, policy or technical issues. The results of the work will be reported to and further addressed by the IGC.

2. The IGC Chair and Vice-Chairs identified the list of issues, taking into account Member States’ suggestions. The *ad hoc* expert group will therefore address the following issues relating to traditional knowledge (TK) and traditional cultural expressions (TCEs):

- Scope of protection;
- Exceptions and limitations; and
- Sanctions and remedies.

3. This Substantive Background Note provides some background information on the above-mentioned issues, and proposes some questions and tasks 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.

Scope of protection

4. The scope of protection seeks to determine which specific acts in respect to TK and/or TCEs ought to be prohibited or prevented and/or which acts that harm TK and/or TCEs would IP-similar instruments on TK and TCEs seek to address.

5. The *ad hoc* expert group is invited to clarify:

- 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 that they can directly manage and enforce, and in a *measures-based approach*, States are enjoined to provide measures for the protection of TK and TCEs. Both approaches are reflected in existing international IP instruments; and,
- the level of detail into which the international instrument should delve, and the point at which national law would take over.

6. The IGC has discussed for several years a so-called “tiered approach”, where 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.

7. In this regard, 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. In particular, the *ad hoc* expert group is invited to consider what criteria are appropriate and should be used in the TK and TCEs contexts, in order to determine the tiers.

Exceptions and limitations

8. The *ad hoc* expert group is invited to consider whether:

- to leave flexibility at the national level to fully regulate exceptions and limitations; or

- to provide a framework with lists of general exceptions and specific exceptions for Member States to regulate at the national level. If so, what should general exceptions at the international level be?

9. Based on the possible introduction of a tiered approach to defining the scope of protection, the *ad hoc* expert group is also invited to consider whether the provisions on exceptions and limitations should also follow this approach, i.e., that various degrees of excepted acts would mirror the various kinds of subject matter and the tiered rights applied to them.

Sanctions and remedies

10. Most existing *sui generis* laws provide that acts that contravene the law shall be punished with sanctions and remedies. The *ad hoc* expert group is invited to consider whether to provide a general framework regarding sanctions and remedies at the international level, and to leave the details to national legislation.

11. If the *ad hoc* expert group believes that a detailed sanctions and remedies framework should be provided at the international level, what should be such sanctions and remedies?

Useful resources

12. 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:

- WIPO/GRTKF/IC/45/4, The Protection of Traditional Knowledge: Draft Articles, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=585931;
- WIPO/GRTKF/IC/45/5, The Protection of Traditional Cultural Expressions: Draft Articles, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=585921;
- WIPO/GRTKF/IC/45/6, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=585974;
- WIPO/GRTKF/IC/45/7, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=585975;
- 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;
- 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;
- Regional, National, Local and Community Experiences, 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.