

Co-Chairs' report on the *Ad Hoc* Experts Group on TK and TCEs.

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The overall objective of the ad hoc expert group on TK and TCE is to address specific legal, policy or technical issues. The group addressed the following issues relating to TK and TCEs – scope of protection, exceptions and limitations and sanctions and remedies. The Substantive background note set out in WIPO_IPTK_TCES_GE_22_2 provides some background information on the above mentioned issues.

The Group were reminded to keep a focus on the nature of the subject matter, being traditional knowledge and traditional cultural expressions, which would not fit easily into the existing property rights.

On scope, the group began by considering the rights-based approach and measures based approach or a combination of the two, and the advantages and disadvantages.

Noting that there remain different views on the nature of the instrument, binding or non-binding, and the approach as to whether or not to include specific rights, in general the group reflected that the two approaches were both valid, and not mutually exclusive. Both approaches are reflected in different existing international intellectual property instruments.

It is important to understand what types of measures could deliver the obligations to achieve certain objectives, and whether both rights and measures are included depends on the perspective, including the perspective of Indigenous Peoples, users, and national mechanisms for implementation. Measures could include legislative measures, administrative measures, and policy measures, which can address different issues. A rights base simply acknowledges that there are certain privileges, while measures should be understood in terms of what would help those parties enjoy and be able to enforce those rights.

A number of experts reflected on Article 31 of the UN Declaration on the rights of Indigenous peoples, and the importance of reflecting those rights of Indigenous peoples as well as further detail in establishing measures to implement those rights. Some felt that a mixture of both rights and measures may satisfy more parties. It was also noted that the instrument could look at the rights that could be implemented or enforced by indigenous and local communities themselves and the rights that the states can help to enforce.

The group discussed notions of public domain, and reflected on the lived experience of Indigenous peoples that their TK and TCEs in their view was not in the public domain, notwithstanding being diffused.

The group considered whether the current tiered approach could be streamlined, for example the group could align the language in Alt 2 between “under exclusive control” and “restricted” to align the concepts.

The ad hoc Expert Group took note of the information provided by the Secretariat that in the early years of the IGC documents had been prepared on topics such as rights and measures-based approaches, the interplay between national and international instruments, the differences between minimum and maximum standards, and options for the legal nature of international instruments. The ad hoc Expert Group recommended that the IGC request the Secretariat to update and streamline these documents in a document to be made available before IGC 46.

There was a general view that exceptions and limitations, and sanctions and remedies flow from the scope of protection. Some expressed the view that a purely measures based approach would result in sanctions being reflected at a national level, whereas a rights based approach would lend itself to inclusion of sanctions in the instrument.

Moving to Exceptions and Limitations, reflecting on users, the group considered for example how someone not connected to custodial communities may come in to legitimately use TCEs or TK, in such a way that it would not be considered as misappropriation or misuse. What would be the exceptions or limitations that apply, for example, educational use, research, or experimental use, and the circumstances where these might apply.

The group reflected on whether for example a compulsory licence situation would work in any of these circumstances, for example where in the context of traditional medicine and knowledge that is intertwined with the rights of custodial communities, but that is relevant to broader communities and nations in situations like the recent COVID crisis. Some felt this would be inequitable because of the nature of TK and the spiritual, economic or moral cost involved. Others reflected on conditions, for example reasonable efforts to get the right to use and if not still make sure you give appropriate compensation to the right holders. Exceptions and limitations like fair use may be more appropriate.

The view was also expressed that, looking at where the rights originate from, it is not a matter of balancing different stakeholders' interests; that these are inherent rights which are not consistent with other types of intellectual property rights as granted by the State. As such, the nature of rights counsels a generous approach on matters of accessibility, hence not looking at it narrowly but allowing States to employ a sui generis approach to dealing with exceptions and limitations.

The experts group reflected on whether exceptions or limitations could be either general criteria, or specific exceptions. For instance, if you ask the question what would do harm or be offensive then exceptions could be case specific. Some members reflected on the core conceptual challenge which is for potential users, knowing what constitutes an offensive use, and the importance of concepts such as freedom of speech

On sanctions and remedies, the group considered what could empower indigenous people and indigenous communities for example where misappropriation has occurred.

Participants discussed the importance of relying on alternative dispute resolution mechanisms, particularly mediation. This is because such mechanisms are influenced by the customary law setting in each indigenous and local community and therefore part of their cultural heritage and exercise of the right of self-determination. It was also noted that there should be coverage of three important mechanisms: Compliance, monitoring and accountability.

The general view was the article dealing with sanctions and remedies should be very short article due to the reality of member states different legal systems. The provision should be left as broad as possible, which would also enable indigenous people to self-identify and self-determine how to handle misuse, misappropriation, piracy or any other kind or category of harm.