

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

**Geneva, February 26, 2023**

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-Fifth Session of the IGC (“IGC 45”), 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. Taking into account Member States’ suggestions, the IGC Chair and Vice-Chairs identified the list of issues relating to traditional knowledge (TK) and traditional cultural expressions (TCEs) for this *ad hoc* expert group. The issues are:
  - Customary law
  - Formalities
  - National treatment
  - Transboundary cooperation
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.

### **Customary law**

4. Black’s Law Dictionary defines “customary law” as a law “consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.” Customary law has also been defined as “locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.”<sup>1</sup> The ways in which customary laws are embodied differ from one another. For instance, the laws can be codified, written or oral, expressly articulated or implemented in traditional practices. Another important element is whether these laws are actually “formally” recognized by and/or linked to the national legal systems of the country in which a community resides. A decisive factor in determining whether certain customs have status as law is whether they have been and are being viewed by the community as having a binding effect, or whether they simply describe actual practices.

Customary laws concern many aspects of communities’ lives. They define the rights and responsibilities of community members on important aspects of their life, culture and world view. For instance, entitlement to and distribution of benefits within a community (including the recognition of entitlements of individuals) may be governed by the customary law and practices that the community itself observes. This is a key area where external legal mechanisms for protection of TK may need to recognize and respect customary laws, protocols or practices.

There is a conceptual and legal divide in relation to how indigenous peoples’ belief systems, customary laws and practices interact with western cultural norms and laws. From their perspective, the very conception of “ownership” in the conventional intellectual property (IP) system is incompatible with notions of responsibility and custodianship under customary laws and systems. This conceptual divide is especially evident in relation to TCEs and copyright as identified in the recently updated WIPO Gap Analysis on TCEs (document WIPO/GRTKF/IC/46/7), in particular, regarding the originality requirement and protection of adaptations or derivative works.

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<sup>1</sup> Protection Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May, 2005.

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

- What kind of relationships between customary law and IP law have been encountered in practice? What models could be explored?
- How do *sui generis* laws for the protection of TK and TCEs apply or otherwise recognize customary law?

### **Formalities**

6. There are a variety of approaches towards formalities as a requirement of protection of TK and TCEs in *sui generis* regimes: they may expressly require registration of TK and TCEs as a condition of protection; they may establish voluntary registries or databases, but not consider them as a requirement to the acquisition of rights; or they may provide that protection does not require formalities.

7. The *ad hoc* expert group is invited to consider the appropriate approach towards formalities, at the international level, for the protection of TK and TCEs.

### **National treatment**

8. “National treatment” is a principle whereby a host country would extend to foreign TK/TCEs holders treatment that is at least as favorable as the treatment it accords to national TK holders in similar circumstances. In this way, national treatment standards seek to ensure a degree of legal equality between foreign and national TK/TCEs holders. It is important to note that national treatment is a relative standard whose content depends on the underlying state of treatment for domestic TK/TCEs holders.

9. A national treatment approach would, in the light of precedent and past experience in the IP field, appear to be an appropriate starting point. However, the very nature of TK/TCEs and the *sui generis* forms of protection may suggest that national treatment be supplemented by certain exceptions and limitations or other principles such as mutual recognition and reciprocity.

10. The protection of foreign holders of rights in TK/TCEs is a complex question. In view of this complexity, the *ad hoc* expert group is invited to provide the IGC with specific guidance on this technical question.

### **Transboundary cooperation**

11. Transboundary cooperation deals with the very important issue of TK/TCEs shared across borders. There seems to be an agreement in the IGC that the concerned countries should cooperate to address the issues arising from the shared TK/TCEs.

12. The *ad hoc* expert group is invited to suggest the most suitable formulation of the TK and TCEs texts for the IGC’s consideration.

### **Useful resources**

13. 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/46/4, The Protection of Traditional Knowledge: Draft Articles, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=595651](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=595651);

- WIPO/GRTKF/IC/46/5, The Protection of Traditional Cultural Expressions: Draft Articles, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=595653](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=595653);
- WIPO/GRTKF/IC/46/6, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=595573](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=595573);
- WIPO/GRTKF/IC/46/7, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=595591](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=595591);
- 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);
- Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues  
[https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview\\_customary\\_law.pdf](https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf)
- 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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