

## **The Report of the Co-Chairs: Edwina Lewis and Anthony Kakooza – Ad hoc Experts Group on TK and TCEs. Drawn from the meeting of Sunday 26<sup>th</sup> February 2023**

The overall objective of the *ad hoc* expert group on traditional knowledge and traditional cultural expressions, as indicated in the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”) was to address specific legal, policy or technical issues on four key areas:

- a) Customary law
- b) Formalities
- c) National treatment
- d) Transborder cooperation

The substantive background note set out in WIPO/IPTK-TCES/GE/23/2 provided some background information, as well as questions and tasks to guide the ad hoc expert group in the consideration of the above-mentioned issues.

**On Customary law**, the Ad Hoc group began by sharing examples of the relationship between customary law and Intellectual Property law practice within their respective jurisdictions. It was emphasized that caution should be exercised in the understanding of and use of the term ‘customary law’. It was also appreciated that the customary law within every given locality or territory is part of the sources of law and defines the rights and responsibilities of community members on important aspects of their life, culture and world view. This plurality of different operative legal traditions should be respected.

Overall, there was consensus in the group that Customary law has a place in the texts and should be allowed to co-exist with written law rather than being usurped or overshadowed by the latter. The text should provide for minimum standards as to how TK/TCEs can be accessed by outsiders in conformity with existing customary laws. Although non-community members cannot be expected to know the existing customs of every community, the language of the text should offer guidance on some form of due diligence or legal compliance over customary norms in enabling access to TK and TCEs, with procedural certainty in such language.

**On the issue of formalities**, the general discussion revolved around the notion that formalities facilitate the process of enjoying the rights in TK and TCEs. As such, they should not be considered as a condition of TK or TCE protection.

What resonated among the group of experts, therefore, was that there should not be any formalities required in the recognition of existing TK and TCEs though it could be advisable to have formalities in the administrative requirements for the same.

**Turning then to the issue of National treatment**, the experts reflected on the practicalities or absence thereof, of assuming a forceful obligation upon a foreign party to adhere to the TK or TCEs of another country; or for such foreign party to also be entitled to the TK/TCE rights that are enjoyed by local indigenous persons.

It was noted that the issue of National Treatment, within the context of TK and TCEs, can be very complicated to articulate, especially in a legal setting that may have no formalities. The focus for

National Treatment should therefore be considered in reference to the purpose of the whole text, as opposed to a particular section of the text.

A view was also expressed and agreed upon that the National Treatment principle could be fronted by a 'Competent Authority' of a Member State. It was also emphatically observed that the principle of National Treatment makes Member States recognize that foreigners will be given the same level of protection that is accorded to locals in the protection of TK and TCEs where the conditions of protection, for example qualifying as a beneficiary, are met. In some respects where the National Treatment principal may not be applicable, transboundary cooperation between States can be considered as well, to the extent applicable and on a case-by-case basis in consideration as to what transborder cooperation relates to. Consideration should also be had to interests of Member States that may not be having Indigenous persons.

On **Transborder cooperation**, the group reflected on the historical landscape of cross-border TK and TCEs in different parts of the world. The provisions on Transborder cooperation in section 5.4 of the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore; as well as Article 11 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization – to the Convention on Biological Diversity, were given consideration.

The group established a consensus on the need to have a clause on Transborder cooperation with guidance from these clauses. However, it was advised that the different Member States involved should consult one another through each other's competent authorities before claiming ownership of TK/TCEs.