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**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

**Thirteenth Session
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**AFRICAN GROUP PROPOSAL ON THE
PROTECTION OF TRADITIONAL KNOWLEDGE,
TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES**

Document submitted by the African Group

1. The Permanent Mission of Algeria has submitted a document on behalf of the African Group entitled “African Group Proposal on the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources,” with the request that it be circulated as a working document for the thirteenth session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (‘the Committee’).
2. The document is reproduced and published in the Annex.
3. *The Committee is invited to take note of this document and the Annex to it.*

ANNEX

AFRICAN GROUP PROPOSAL ON THE
PROTECTION OF TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL
EXPRESSIONS AND GENETIC RESOURCES

The African Group, in making this submission, is of the opinion that the ultimate objective of this process should be the development and adoption of a legally binding international instrument for the protection of traditional knowledge, traditional cultural expressions and genetic resources. The African Group also believes that much work has been done towards the review of legal and policy options for the protection of traditional knowledge, traditional cultural expressions and genetic resources which have been based on extensive international, regional and national experiences as highlighted in the “factual extractions”.

It is important to bear in mind that the comments to the 10 issues currently under discussion, and of which the Members of the African Group has provided comprehensive responses, are complementary to the work done by the WIPO IGC in establishing parameters for defining and clarifying issues related to Objectives and Principles for the protection of traditional knowledge traditional cultural expressions and genetic resources.

In addition to this, the submission is made without prejudice to the establishment of a framework for the development and adoption of an instrument defining the scope, subject matter, rights conferred and related issues pertaining to the protection of traditional knowledge traditional cultural expressions and genetic resources.

Consideration of the factual extractions under the ten issues on the Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) should be streamlined into the current work of the IGC so as to expedite deliberations in the IGC on substantive matters pertinent to the establishment of an international framework for the protection of traditional knowledge, traditional cultural expressions and genetic resources.

Pursuant to the above, the African Group would like to present its comments and recommendations on the factual extractions concerning Traditional Knowledge and Traditional Cultural Expressions. The African Group has studied the factual extractions, without attribution and has made the following observations on the points of convergence and divergences by Member States on the ten issues.

THE PROTECTION OF TRADITIONAL KNOWLEDGE

Issue 1 - Definition of Traditional Knowledge

The general consensus is that a working definition of Traditional Knowledge (TK) is important. The views vary from a broad definition to a more concise and narrower definition. Article 3 (“general scope of subject matter”) in document WIPO/GRTKF/IC/11/5C would be a good starting point for discussions.

View 1:

The definition should:

- Include “knowledge systems, generated from local indigenous or traditional communities” as well those “generated, preserved and transmitted in different approaches, different people, including ethnic (minorities) groups”.
- “Be anthropological”
- “Be accumulated knowledge that was the result of intellectual activity and insight into a traditional context and included the know-how, skills, innovations ... embodied in the traditional lifestyle systems”.

View 2:

- Questions whether the definition be formal or rigid? The definition should consider the evolving nature of TK.

View 3:

- Precise definition important in order for a common understanding.
- Definition required to obtain legal certainty so that it’s clearly identifiable and described. A single definition is not appropriate.
- Look at the purposes of protection, whether that protection is by legal, non-legal, national and international means.

Way Forward:

The IGC should have a concise and flexible working definition which is complemented by a list of examples of TK.

The definition of TK should also include innovative aspects. The term should not be limited to a single technical field and be inclusive of all knowledge systems.

Issue 2 - Who Should Benefit From Any Such Protection Or Who Should Hold The Rights To Protectable Traditional Knowledge

The view is that Article 4 (“beneficiaries of protection”), and Article 5 (“eligibility for protection”) of the document WIPO/GRTKF/IC/11/5(c) is an adequate basis for further work.

View 1:

- Article 4 (“beneficiaries of protection”), Article 5 (“eligibility for protection”) in document WIPO/GRTKF/IC/11/5(C) provides a good basis for identifying beneficiaries for further discussion.
- “Developments on this issue should follow developments in relevant international fora.”
- “Protection of TK should benefit the communities who generated, preserved and transmitted the knowledge in a traditional and intergenerational context, who were associated with it and who identified with it.”
- “Rights-holders and beneficiaries of any benefits flowing from the use or exploitation of TK and TCE’s should be the traditional knowledge holders and TCEs creators themselves and their community (ies).”
- “Considering existing human rights instruments...protection of TK should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context.”

View 2:

- “The scope of a community etc. should be clarified and would be necessary to set guidelines in order to clarify relations between the interested parties.”

Way Forward:

That Article 4 (“beneficiaries of protection”), Article 5 (“eligibility for protection”) in document WIPO/GRTKF/IC/11/5(C) be considered as a basis in identifying the beneficiaries for protection. The overall views identify beneficiaries to include, amongst others, knowledge holders and practitioners from local communities.

The State will act as custodians of the TK taking into due consideration the interests of the local communities concerned.

Ownership of transnational TK should be treated as a special category as it is not a norm.

Issue 3 - What Objective Is Sought To Be Achieved Through According Intellectual Property Protection (Economic Rights/Moral Rights)

The general view as to the objective sought to be achieved looks at the principles of fair and equitable benefit-sharing, prior informed consent, the recognition of knowledge holders and the protection of their economic and moral rights. There is general agreement for the need for economic and moral rights policy objectives in varying degrees. One view, however, recognises the moral rights but not the economic rights. Overall consistency and complementarity to existing IP regimes is articulated.

Few were yet unclear as to specifying the objective to be achieved.

View 1

- Article 6 (“fair and equitable benefit-sharing and recognition of knowledge holders”) and Article 7 (“principle of Prior Informed Consent”) in WIPO/GRTKF/IC/11/5(C) is a good basis for discussion.
- The link between TK and biodiversity, established under the Convention on Biological Diversity (CBD) and its Bonn Guidelines, indicate that economic rights and objectives are also relevant.
- To ensure proper attribution of rights through recognition of TK’s contribution to creative endeavors
- It was both the economic and moral rights that were to be protected as a means of rewarding the holders of TK

View 2

- The “intellectual property” mentioned would not be limited to the existing systems, but also include the new system related that may come into being in the future.

View 3

- The key initial step in the development of any approach to the protection of TK as it intersects with IP is to first determine the relevant policy objectives and general guiding principles. Measures should be consistent with, complimentary to, existing IP regimes.
- The IGC has made substantial progress in identifying and articulating a wide range of specific policy objectives for the protection, preservation and promotion of TK.
- The argument to extend IP protection to TK for economic rights does not clearly contain or identify a justifiable reason why traditional knowledge is eligible for such protection.

Way Forward:

That prior informed consent (PIC), mutually agreed terms (MAT) and benefit-sharing are the means to achieve moral and economic rights through IP protection.

Issue 4 - What Form Of Behaviour In Relation To The Protectable Traditional Knowledge Should Be Considered Unacceptable/Illegal

The general view looks at, and elaborates, certain elements contained in Article 1 of (“protection against misappropriation”) of WIPO/GRTKF/IC/11/5C.

Other comments provide suggestions as to how to identify these forms of behaviour that should be considered unacceptable/illegal.

View 1:

- Article 1 (“protection against misappropriation”) of WIPO/GRTKF/IC/11/5 (c) provided an adequate basis for discussions
- More specifically to those who use TK that has already been accessed, to disclose the origin of the TK in an appropriate way and not disguise, distort or tamper the fact.
- Unauthorized reproduction, adaptation and commercialization with no sharing of benefits (economic or otherwise) with the relevant TK and/or TCE’s holders.
- TK should be protected, against misappropriation which consists of any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means

View 2:

- Convergence on the draft policy objectives would be an important first step to addressing concerns raised in the IGC
- Important to have a set of clear and agreed objectives before delineating forms of behaviour that might be considered to be unacceptable.
- Suggest the conducting of a fact-finding survey to find out what damage is incurred by what acts.

Way Forward:

That Article 1 (“protection against misappropriation”) of WIPO/GRTKF/IC/11/5(c) and Article 10bis of the Paris Convention relating to unfair competition be considered as a basis to identify unacceptable/illegal forms of behaviour.

There is convergence of views on various elements regarding unacceptable/illegal forms of behaviour.

Issue 5 - Should There Be Any Exception Or Limitations To Rights Attaching To Protectable Traditional Knowledge

Although the general views on issue of exceptions and limitations are similar with consideration for further analysis, there is still the view that this issue should not be discussed at this stage.

View 1:

- Article 8 (1) (“exceptions and limitations”) represents adequate basis for discussion.
- The rights of TK holders should have lesser limitations and exceptions than in the case of other IPRs

View 2:

- Further analysis is required in order to determine what should be considered unacceptable or illegal, and where limitations can be drawn.
- Exceptions and limitations dependent on kind of protection accorded to TK

View 3:

- Important to have a set of clear and agreed objectives before delineating exceptions and limitations.
- Premature for the IGC to discuss exceptions and limitations.
- Any justifiable reasons for IP right protection to be extended to TK are not clearly identified and sufficiently explained.

Way Forward:

We are of the view that there should be some limitations and exceptions taking into account, inter alia, public interest and the continuing customary use and practice of the community.

Issue 6 - For how long should protection be accorded?

The comments under this issue look at perpetual protection versus limited period of protection. Overall, the views agree on perpetual protection, however, in view of existing IP laws, the limitation on the period still needs to be considered.

View 1:

- Protection should be in perpetuity, not limited to a fixed term.
- Protection last as long as the TK fulfills the criteria for eligibility for protection.

View 2:

- No objection to protection limited in time, however, discussions are necessary to determine duration of protection to last as long as the distinctive association and protected subject remains intact

View 3:

- The term of IP right for TK should be limited to balance the interest of investors and the public.
- The length of protection would depend on what is being protected and objectives being pursued.

Way Forward:

We are of the view that the duration of protection should be in perpetuity however, the duration of protection should be viewed under the provisions of exceptions and limitations.

Issue 7 - To what extent do existing IPRS already afford protection? What gaps need to be filled?

View 1:

- The current IP system does not offer protection to the stock of TK owing to the holistic and expansive nature of the knowledge. However, in some specific cases elements of TK could be protected within the existing IP system
- IPR rules have so far proved insufficient to safeguard TK holders against misappropriation
- Although the existing IPR system could afford protection for TK to some extent, it is not enough
- The key issue is that the IP system is limited to the protection of economic and commercial rights. It was not designed to protect cultural values and identity associated with TK

View 2:

- Exploring the use of the current IP systems on TK as long as criteria are met (i.e. Trademarks; Article 10bis of the Paris convention, geographical indications, label of origin)
- Explorations of national and community use of IPR will help the IGC to identify gaps in existing international frameworks. These perceived gaps could then be considered and addressed.
- Mandatory system of disclosure of TK is a gap in the current IP system

View 3:

- At this stage there is no perceivable gap between the current system and the necessary forms/level of protection. Under limited cases TK can be protected under current IP system

Way Forward:

There are some areas where IP systems are applicable to some facets of TK. Therefore there is a need for a holistic legal instrument for TK. Consideration should include the development of a sui generis system.

Issue 8 - What sanctions or penalties should apply to behaviour or acts considered to be unacceptable/illegal?

The general agreement is that there should be application of sanctions and penalties.

View 1:

- Appropriate civil and criminal sanctions and penalties should be applied.
- Formulation in Article 8 (a) (“sanctions, remedies and exercise of rights”) under the TCEs document WIPO/GRTKF/IC/12/4C was found appropriate.
- Criminal penalties or a combination of criminal and civil may be more appropriate
- “Any acts that contravene the laws could be subject to effective sanctions”

View 2:

- Discussions would not advance the work of the IGC at this time
- Any justifiable reasons for IP right protection to be extended to TK are not clearly identified and sufficiently explained
- It is only once when an understanding of objectives and possible measures is developed further that fruitful and detailed discussions could be undertaken further

Way Forward:

Any acts that contravene the laws should be subject to effective sanctions.

Currently sanctions and penalties are being applied.

Issue 9 - Which issues to be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

View 1:

- WIPO had the responsibility to develop an international framework for norms and standards leading to a legally binding international instrument
- International instrument applicable to (i) requirements for prior informed consent and benefit sharing (ii) acts of misappropriation (iii) need for effective enforcement measures
- To solve the problems of access and misappropriation of TK abroad
- Protection of TK is needed at the international level to prevent misappropriation, misuse and misrepresentations

View 2:

- Requires a careful consideration of both the national and international aspects of the complex issues

View 3:

- Premature to discuss but supports a flexible approach. Either leaving to national legislators or non-binding legal outcome at the international level.
- Favors solutions in the form of non-binding mechanisms as this provides greater flexibility and choice of implementation at the national level.'

Way Forward:

There is general consensus for the need of an international instrument(s) or framework.

However the legal status of the instrument(s) at the international level is still under consideration.

Issue 10 - How Should Foreign Rights Holders/Beneficiaries be treated?

The principle of national treatment is the general view on treatment of foreign rights holders/beneficiaries.

View 1:

- “the principle of national treatment should apply”

View 2:

- *“Any justifiable reasons for IP right protection to be extended to TK are not clearly identified and sufficiently explained.”*
- *“Further work is needed to determine how foreign rights holders/beneficiaries should be treated given that many cultures have common wellsprings.”*

Way Forward:

The principle of national treatment should apply in compliance with other international legal obligations and provisions.

PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

It is instructive to note that most countries have welcomed the ten issues as allowing the IGC to focus more on the substantive issues at stake; or as an opportunity for members to engage in the kind of focused discussion needed to reach a consensus on these important questions.

The ultimate goal of the ten issues should therefore be to bring about a more focused and constructive discussion of the issues towards attaining a positive outcome.

Issue 1 – Definition of Traditional Cultural Expressions that should be protected.

View 1:

- Various countries gave illustrative lists of TCEs as contained in their respective legislations.
- Any artistic or traditional expressions that are the results of individual or communal creativity.
- Should be determined by the relevant customary laws.
- The terms are unclear at the moment.
- The working definition provided in Article 1 (“subject matter for protection”) document WIPO/GRTKF/IC/11/4C is a good basis for further work.

View 2:

- Formal or rigid definition may not be needed
- Clear definition is a prerequisite

Way Forward:

While there is yet no clear and acceptable definition, the formulation in document WIPO/GRTKF/IC/11/4C is a good basis for further improvement of the definition of TCEs.

While this is viewed as a good working definition, the definition should not be rigid and remain flexible and descriptive. The definition should take into account the element of the community and that it is passed one from generation to generation. Cultural expressions differ from community to community

The Berne Convention definition is limited to copyright forms. While it is suitable for certain forms of TCEs (literary and artistic) it does not extend to protecting the universe of TCEs

Issue 2 – Who should benefit from such protection or hold the rights to protectable TCEs?

View 1:

- Local communities only.
- Local communities and recognized individuals.

View 2:

- Concerns exist for inter-communal and cross-border issues.

Way Forward:

The local communities should be the primary beneficiaries of any protection but the relevant customary laws and protocols should be a determinant. Provisions should be put in place to address inter-communal and cross-border cases.

Originating community should be the beneficiary.

Since the definition of a community has been problematic it is important to offer general guidelines as to what constitutes a community. We should not be forced into adopting a narrow legal definition. Where the origins are indeterminable, or beneficiaries are not easily identified, the State becomes the custodian.

Issue 3 – What Objective is sought to be achieved through IP protection (economic/moral rights)?

View 1:

- Many countries have listed various objectives to be achieved
- At this stage it did not appear to be amenable to protection, at the international level, as a form of IP. Not eligible for protection

View 2:

- The object of protection is unclear and need further discussion.
- The broadest overall objective of providing intellectual property rights is to promote creativity and innovation. Policy objectives might include, among others, promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs/EoF, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation.

View 3:

- The objective should be the protection of moral rights for the preservation of culture and not economic rights.

Way Forward:

The objective of IP protection should be positive and defensive. It should cover both the economic and moral rights as they are interlinked. All TCEs should be IP protected at both national and international level.

Issue 4 – What forms of behavior in relation to the protectable TCEs should be considered unacceptable/illegal

View 1:

The following are identified as reprehensible:

- Derogatory use
- Unauthorised exploitation
- Unauthorized commercial exploitation
- Misappropriation
- Distortion and disrespect/denigration
- Unauthorised disclosure of secret TCEs

View 2:

- Doubts exist on the need for additional protection.

Way Forward:

Although a few countries expressed concerns over the use of the term “misappropriation” the majority agree that abuses should be prohibited. A minimum standard of protection should therefore be agreed upon, working from Article 3 (“acts of misappropriation (scope of protection)”) of document WIPO/GRTKF/IC/11/4C.

The list should include

- violation of rules regarding the confidentiality and sacredness which govern practices and observances of traditional knowledge
- Suppression of the rights of knowledge holders in any form
- Derogatory use
- Unauthorized commercial exploitation
- Misappropriation
- Distortion, disrespect and denigration
- Unauthorised disclosure of secret TCEs

Issue 5 – Should there be any exceptions or limitations to rights attaching to protectable TCEs?

View 1:

- Many think Article 5 (“exceptions and limitations”) of document WIPO/GRTKF/IC/11/4C is a good basis for discussion.
- There is, in principle, need for appropriate exceptions and limitations.
- Countries are not fully agreed on what should be included in the list of exceptions and limitations.

View 2

- Some countries are not ready to fully engage on this issue before the clarification of the substantive provisions.

Way Forward:

The list of possible exceptions should not be closed as negotiations on this continues and may bring up new issues; but document WIPO/GRTKF/IC/11/4C is an acceptable benchmark.

As there is no conclusion as to the objectives and the rights granted, it is important to leave the exceptions open. It is dependent on what rights are to be granted.

Issue 6 – For how long should protection be accorded?

View 1:

- Protection should not be limited in time so long as the TCE satisfies the requirements of protection

View 2:

- Reservations on the discussion of this issue at this point
- It is premature to discuss this issue.

Way Forward:

The determination of duration should be linked to the provisions on qualification (so long as the TCEs meet the requirements of protection). Many agree that the document WIPO/GRTKF/IC/11/4C is a good starting point.

Protection should not be limited in time for as long as the TCE satisfies the requirements of protection, as long as they remained integral to their collective identity and subject to the exceptions and limitations.

Issue 7 – To what extent do existing IPRs already afford protection? What gaps need to be filled?

View 1:

- The present protection available under IPR is limited and not adequate.
- General support for a gap analysis to be carried out.

Way Forward:

While some of the existing IP regimes may apply to TCEs, this will not always be the case and there is need to fill the gaps that currently exist.

The Intellectual Property regime was not designed to with TCEs in mind and there are several TCEs that would not be eligible for the existing protection offered by the IPRs system. There is a need to come up with a sui generis system of protection to address gaps left by the IPR system.

Issue 8 – What sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal?

View 1:

- Article 8 (“sanctions, remedies and exercise of rights”) of WIPO/GRTKF/IC/11/4C is a good basis for discussion.
- it is neither early nor premature.
- Appropriate and effective sanctions [civil, criminal or administrative] should be provided for.

View 2:

- It is premature to discuss this at this point

Way Forward:

It is agreed that some form of sanction must be available, but for effectiveness, the appropriate rules to be employed must address the different options– civil, criminal as well as administrative.

Sanction must be appropriate and commensurate to the violation.

Issue 9 – Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

View 1:

- The committee should come up with an internationally binding instrument.

View 2:

- The Committee at this time should only engage in discussions without prejudging any outcomes.

Way Forward:

This question is at the heart of the future work of the IGC and the discussions of the Committee should be with a view to attaining some concrete outcomes that would effectively protect the rights of TCE holders.

The main purpose is to come up with an international instrument.

Issue 10 – How should foreign rights holders/beneficiaries be treated?

View 1:

- principle of national treatment and reciprocity

View 2:

- This should await discussions on other issues/may not be necessary.
- Consistency with other international obligations of Member States

Way Forward:

There is a general consensus that any outcome should be consistent with international obligations of Member States as to the rights of foreign rights holders. The principle of national treatment and reciprocity should be applied.

GENETIC RESOURCES

In view of the current work being undertaken by WIPO within the mandate of the Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”), the African Group appreciates the substantive contributions of the WIPO Secretariat in the area of Genetic Resources as it relates to Intellectual Property (IP). The future work within the IGC on genetic resources (GR) should be carried out in accordance with the substantial developments within other international foras

The African Group acknowledges the process of elaborating and negotiating the International Regime on Access and Benefit-Sharing (ABS) within the Convention on Biological Diversity (CBD) and takes into account the work of WIPO in terms of genetic resources.

The African Group recalls the requests from the CBD to the WIPO IGC in support of its work currently being undertaken with regards to the International Regime on Access and Benefit-Sharing (ABS), without prejudice to the work of other international foras.

With the aim to harmonise and systematize the work already in progress in other international and national foras taking into account the proposals already submitted by the African Group and other Member States, the African Group is of the view that there are key linkages amongst the various international processes and that there is a need for harmonization to enhance better understanding and mutual support amongst these processes.

Recognise the work already carried out by WIPO on the ten issues contained in document WIPO/GRTKF/IC/11/8(a) for continuing our further work and recommends that this work be coupled and synthesized into one summary document to be made available to Member States.

The African Group proposes the following that WIPO:

- (i) Consider developing a range of options for the IP related aspects of ABS arrangements that could ensure benefit-sharing. In doing so, also develop a structured menu of options to guide custodians of genetic resources to facilitate their decision making process.
- (ii) Consider developing disclosure requirements and alternative proposals for dealing with the relationship between IP and GR as requested by the CBD.
- (iii) Consider developing guidelines and procedures with regards to dealing effectively with the IP aspects of access and benefit-sharing arrangements.
- (iv) Consider supporting demand and needs driven capacity building initiatives in Africa relevant to the relationship within IP and GR as well as the interface amongst World Intellectual Property Organisation (WIPO), Convention on Biological Diversity (CBD), World Trade Organisation (WTO) and Food and Agriculture Organisation (FAO).

(v) Further emphasizes the linkages that exist amongst WIPO, CBD, FAO and WTO. In this regard, encourages these organizations to interact and participate actively amongst themselves, within their respective mandates, to foster synergistic implementation of related activities.

[End of Annex and of document]

