

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

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THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES

Document prepared by the Secretariat

INTRODUCTION

1. During the Second Intersessional Working Group ('IWG 2'), which met from February 21 to 25, 2011, six informal open-ended drafting groups prepared draft articles on traditional knowledge. These draft articles were commented on by the IWG 2 plenary on February 24 and 25, 2011 and some alternative options were proposed by experts.
2. As requested by IWG 2, the Secretariat prepared a document incorporating the draft articles prepared at IWG 2, which was made available as document WIPO/GRTKF/IC/18/7 at the eighteenth session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee'), which took place from May 9 to 13, 2011. In addition to the draft articles themselves, that document included: (i) the introduction made by the rapporteur of the relevant drafting group; (ii) comments on the proposed articles made by the experts in the IWG 2 plenary in the afternoon of Thursday, February 24, 2011 and on Friday, February 25, 2011; and, (iii) any alternative options presented by experts on the same days.
3. At the eighteenth session of the Committee, the draft articles contained in WIPO/GRTKF/IC/18/7 were discussed and an informal open-ended drafting group was established by the Committee to further streamline the articles.

4. The Committee “took note of the text of the draft articles on traditional knowledge prepared by the open-ended informal drafting group established by the Committee, based on WIPO/GRTKF/IC/18/7. The Committee requested that the text be made available as a working document for the Committee at its next session.”¹ The text appears in the annex to the present document.

Preparation and structure of this document

5. In the interest of keeping the present document as concise and clear as possible, in the Annex, in line with the decision of the Committee at its eighteenth session, amendments proposed by Member States are reflected in the text. Proposed insertions are underlined, while words or phrases that a Member State has proposed be deleted or has questioned are put between square brackets. Drafting proposals from observers which received Member State support are included. Slashes separate drafting options. None of the text featured in the footnote is from the Secretariat.

6. *The Committee is invited to review and comment on the articles contained in the Annex towards developing a revised and updated version thereof.*

[Annex follows]

¹ Draft Report of the Eighteenth Session of the Committee (WIPO/GRTKF/IC/18/11 Prov.)

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Definition of traditional knowledge

Option 1

- 1.1 Traditional knowledge means knowledge including know-how, skills, innovations, practices, and learning which is collectively generated, preserved and transmitted in a [traditional] and intergenerational [context] within an indigenous or local community. [resulting from intellectual activity in a traditional context including the know-how, skills, innovations, practices and learning that form part of the traditional knowledge systems of an [indigenous people or local community¹].]

Option 2

- 1.1 (a) Traditional knowledge is dynamic and evolving. It is the result of the [intellectual activities] in [diverse traditional contexts], including scientific knowledge, skills, competencies, innovations, practices and teachings in a collective framework including codified knowledge systems, continuously developed, evolved and widely used, following any changes in the environment, geographical conditions and other factors [of [indigenous peoples or [and] local communities]];

Indigenous knowledge of indigenous peoples and indigenous nations must be protected under the principles of the right to self-determination and the right to development.

(b) Traditional knowledge is part of a collective, ancestral, territorial, spiritual, cultural, intellectual and material heritage;

(c) Traditional knowledge is transmitted from generation to generation in diverse forms and is inalienable, indivisible and imprescriptible;

(d) Traditional knowledge is intrinsically linked to biodiversity natural resources and sustains cultural, social and human diversity embodied in traditional lifestyles.

Option 3

- 1.1 For the purpose of these provisions, traditional knowledge refers to the know-how, skills, innovations, practices, and learning resulting from intellectual activity in a traditional context.

¹ The term "indigenous people and local community" is used as a place holder. This term will be addressed by the group considering beneficiaries of protection.

Criteria for eligibility

Option 1

1.2 [Protected traditional knowledge is knowledge that is:] / [Protection extends to traditional knowledge that is:]

(a) [the unique product of or is [distinctively]] associated with [an indigenous people or local communities]; and

Alternative

(a) distinctively associated with an indigenous people or local community [and customarily recognized as belonging to a [local or traditional community] or nations]; and

(b) [collectively generated, preserved and transmitted [from generation to generation] [in a traditional context]; and]

Alternative

(b) generated and collectively shared, preserved and transmitted [from generation to generation] OR [in a traditional and intergenerational context]; and/or

(c) [integral to the cultural identity of [an indigenous people or local community] or nations, family or individuals].

Alternative

(c) identified with [integral to] the cultural identity of a [local, indigenous or traditional peoples or communities or nations] that is recognized as the owner through a form of custodian or collective and cultural ownership responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

Option 2

[(a) to (c) above, plus;

(d) [not made widely known outside that community;]

(e) not the application of principles, rules, skills normally, and generally, well known]

Option 3

Protection shall be extended to traditional knowledge which:

(a) is the unique product of or is distinctively associated with an indigenous or local community;

(b) is integral to the cultural identity of an indigenous or local community;

(c) has not been widely known outside that indigenous or local community for a reasonable period of time with prior informed consent; and

(d) is not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.

[Secret traditional knowledge

- 1.3 [Protected] secret or sacred traditional knowledge is knowledge that is kept secret by the beneficiary group and is not shared, and has not been shared, by those outside of the beneficiary group.]

ARTICLE 2

BENEFICIARIES OF PROTECTION

Beneficiaries of protection are holders of traditional knowledge [who generate, promote, protect, preserve and transmit knowledge in a traditional and [or] intergenerational context [[in accordance with Article 1]. Holders of traditional knowledge] include, but are not limited to, indigenous [and] [peoples,] local communities [[and nations] [family or individuals.]]] and other particular names contained in the domestic legislation of the parties [and, where the traditional knowledge holders are unknown, State as their legal representative.]

Alternatives

[Measures for the protection of traditional knowledge should be for the benefit of the indigenous peoples and local communities who develop, express, hold and maintain the traditional knowledge.]

Beneficiaries of protection are those indigenous and local communities who are holders of [have generated, preserved and transmitted] traditional knowledge that is covered by Article 1.

Beneficiaries of protection include indigenous peoples, local communities and nations, in accordance with national legislation.

Beneficiaries of protection are holders of traditional knowledge including indigenous communities and other local communities in accordance with Article 1.

Beneficiaries of protection are indigenous and local communities who generate, preserve and transmit knowledge in accordance with Article 1.

ARTICLE 3

SCOPE OF PROTECTION

Option 1

- 3.1 The beneficiaries of traditional knowledge protected under this instrument shall [/should] have the exclusive collective rights to:

Alternative

Contracting parties shall provide to beneficiaries as defined in Article 2 the following exclusive rights:

- (a) enjoy and exclusively control and [exploit] utilize their traditional knowledge;
- (b) authorize or deny the access and use of their traditional knowledge;
- (c) have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms and fair benefits;
- (d) prevent misappropriation and misuse, including any acquisitions, appropriation, use/practice or [exploitation] utilization of their traditional knowledge, without their prior and informed consent and establishment of mutually agreed terms;
- [(e) require, in [prevent] the granting of IP rights involving the use of their traditional knowledge, [without] the mandatory disclosure of traditional knowledge holders and their country of origin as well as evidence of compliance with prior and informed consent and benefit-sharing requirements;]
- (f) prevent the use of traditional knowledge [beyond its traditional context] without acknowledging the source and origin of that traditional knowledge; acknowledging and attributing the traditional knowledge holders where known; and respecting the cultural norms and practices of its holders.

- 3.2 [Contracting parties] Member States shall [/should] provide adequate and effective legal means/measures to ensure the application of these rights taking into account relevant customary laws and practices.

- 3.3 For the purposes of this instrument, the term "utilization" ["exploitation"] in relation to traditional knowledge shall refer to any of the following acts:

i. Where the traditional knowledge is a product:

(a) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

(b) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;

ii. Where the traditional knowledge is a process:

- (a) making use of the process beyond the traditional context;
 - (b) carrying out the acts referred to under sub clause (i) with respect to a product that is a direct result of the use of the process.
- iii. Research and development leading to profit making or commercial purposes.

[Option 2

- 3.1 The beneficiaries of [protected] traditional knowledge, shall/should have adequate and effective legal means/measures to exercise control and exploit their traditional knowledge, to authorize the access and use of their traditional knowledge, to have a fair and equitable share of benefit arising out of the use of their traditional knowledge and to prevent any unauthorized disclosure, use, or other exploitation [and in particular any acquisitions, appropriation, or use that fails to meet the prior and informed consent of the traditional knowledge holders or infringes the mutually agreed terms.]
- 3.2 In respect of traditional knowledge there should/shall be measures to require that those using traditional knowledge beyond its traditional context:
- (a) acknowledge the source of traditional knowledge and attribute the traditional knowledge holder where known, unless the traditional knowledge holders decide otherwise; and
 - (b) use traditional knowledge in manner that respect the reputation and integrity of traditional knowledge [cultural norms and practices of its holders].]

[Option 3

- 3.1 Protected traditional knowledge, which has not been disclosed by traditional knowledge holders outside the traditional/cultural context, should be protected from unauthorized disclosure, use or other exploitation in an appropriate way. Prior and informed consent should be obtained for use of the traditional knowledge, and that any benefit arising from that use should be shared in a fair and equitable way with the relevant traditional knowledge holders based on mutually agreed terms.
- 3.2 Prior and informed consent should be obtained for the commercial or industrial use of traditional knowledge and any benefits arising from that use should be shared in a fair and equitable way where a user would not have reasonably be expected to know that traditional knowledge had been previously disclosed.
- 3.3 In respect of protected traditional knowledge including that which had been disclosed outside of traditional context, those using such traditional knowledge beyond its traditional context should, as appropriate, be required to:
- (a) acknowledge the source of traditional knowledge and attribute the traditional knowledge holder where known, unless the traditional knowledge holders decide otherwise; and
 - (b) use traditional knowledge in manner that respect the cultural norms and practices of its holders]

Alternative

[Adequate and effective legal, policy or administrative measures should be provided, as appropriate and according to domestic legislation, to:

(1) prevent the disclosure, use or other exploitation of secret traditional knowledge

(2) where traditional knowledge is knowingly used outside the traditional context

(a) acknowledge the source of traditional knowledge and attribute the traditional knowledge holder where known, unless the traditional knowledge holders decide otherwise

(b) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders

(3) ensure, where the traditional knowledge is secret or not widely known, prior and informed consent is obtained and any benefits arising from commercial use are shared in a fair and equitable way with the relevant traditional knowledge holders based on mutually agreed terms.

Alternative

(3) Encourage, where the traditional knowledge is secret or is not widely known, traditional knowledge holders and users to establish mutually agreed terms agreements with respect to the sharing of benefits arising from commercial use.]

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

- 4.1 States should / Member States [Contracting Parties shall [undertake to]] adopt, [[as appropriate and] in accordance with their legal systems], the measures necessary to ensure the application of this instrument.

[Option 1

- 4.2 Member States shall [/should] ensure that enforcement procedures are available under their laws against the [willful or negligent] infringement of the protection provided to traditional knowledge under this instrument sufficient to constitute a deterrent to further infringements.

Option 2

- 4.2 Contracting Parties undertake to implement the mechanism.

Accessible, appropriate and adequate criminal, civil and administrative enforcement procedures and dispute resolution mechanisms, border measures, sanctions and remedies, shall [should] be available in cases of breach of the protection of the traditional knowledge so as to permit effective action against any act of infringement [misappropriation or misuse] of traditional knowledge, including expeditious remedies which would constitute a deterrent to further infringement [misappropriation or misuse].

- 4.3. These procedures should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for holders of traditional knowledge. [They should also provide safeguards for legitimate third party interests and the public interests.]
- 4.4 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge the parties may agree to [each party may [shall] be entitled] to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law that is most suited to the holders of traditional knowledge. The dispute resolution mechanism between beneficiaries and users should be assigned to national law when beneficiaries and users are from one country.
- 4.5 To promote relevant measures for the carrying-out of cultural expertise, that take into consideration customary laws, protocols and community procedures for the purposes of dispute settlement.

Option 3

- 4.1 Appropriate legal, policy and/or administrative measures should be provided to ensure the application of this instrument, including measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent. Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.
- 4.2 The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

- 4.3 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge each party shall be entitled to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law.]

ARTICLE 5

ADMINISTRATION OF RIGHTS

The establishment of a national or regional authority or authorities under this article is without prejudice to the national law and the right of traditional knowledge owners to administer their rights according to their customary protocols, understandings, laws and practices.

In the case that the Member State decides thus that they should establish this authority:

- 5.1 A Member State [contracting party] shall [may] free, prior and informed consent of [, in consultation with] the owners [holders] of traditional knowledge in accordance with its national law, may establish or appoint an appropriate national or regional competent authority or authorities. The functions may include, but need not be limited to, the following:

Alternative

Where so requested by traditional knowledge holders a competent authority (regional, national or local) may to the extent authorized by the holders:

(a) disseminate [disseminating] information and promoting practices about traditional knowledge and its protection under protection of its beneficiaries;

(b) ascertaining whether free, prior informed consent has been obtained;

Alternatives

(b) providing advice to traditional knowledge holders and users on the establishment of mutually agreed terms.

(b) applying the rules and procedures of the national legislation regarding prior and informed consent and to the fair and equitable sharing of benefits.

[(c) supervising fair and equitable benefit-sharing; and]

(d) assist [assisting], where possible and appropriate, the owners [holders] of traditional knowledge in the use, practice [exercise] and enforcement of their rights over their traditional knowledge.

(e) determine whether an act pertaining to traditional knowledge constitutes an infringement or another act of unfair competition in relation to that knowledge.

- 5.2 Where traditional knowledge fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation and approval of the traditional knowledge owners [holders] where possible, administer the rights of that traditional knowledge.
- 5.3 The identity of the [competent] national or regional authority or authorities shall [/should] be communicated to the World Intellectual Property Organization.
- 5.4 [The establishment of a national or regional authority or authorities under this article is without prejudice to the national law and the right of traditional knowledge owners

[holders] to administer their rights according to their customary protocols, understandings, laws and practices.]

- 5.5 The established authority shall include authorities originating from indigenous peoples so that they form part of that authority.

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

Option 1

6.1 Measures for the protection of traditional knowledge should [/shall]:

(a) not restrict the generation, creation, customary use, transmission, exchange and development of traditional knowledge within and among communities in the traditional and customary context by the beneficiaries [as determined by customary laws and practices] consistent with domestic law of the Member State [laws of Member States] consistent with international law and principles that protect indigenous peoples and indigenous nations and local communities from exploitation; and

(b) extend only to utilization of traditional knowledge taking place [outside the membership of beneficiary community or] outside traditional or customary context.

(c) in the interpretation of this article, the provisions of Article 3.1 (e) and (d) with regard to prior informed consent shall apply *mutatis mutandis*.

6.2 Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.

Option 2

6.1 The application and implementation of protection of traditional knowledge should not [adversely affect] be prejudicial to continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge owners [holders].

Option 1

6.2 It shall be a matter of national law to permit [Parties may adopt] appropriate limitations or exceptions, provided that the use of traditional knowledge is compatible with free, prior and informed consent [fair practice], acknowledges the indigenous and local community where possible, and does not unreasonably conflict with the cultural norms and practices of the traditional knowledge holders [and is not offensive to the indigenous or local community].

[Option 2

6.2 It shall be a matter of national law to permit [Parties may adopt] appropriate limitations or exceptions, provided such exceptions are limited and do not conflict with the normal use of the traditional knowledge by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries[, taking into account the legitimate interests of third parties].]

[6.3 Secret and sacred traditional knowledge [may/][shall] not be subjected to exceptions and limitations.]

[Member States shall ensure that the protection of traditional knowledge shall neither hinder nor encumber the independent discovery or the independent invention of the same knowledge.]

If the independent discovery or the independent innovation is based on traditional knowledge, exemptions and limitations should be over traditional knowledge with country of origin.

ARTICLE 7

TERM OF PROTECTION

[Option 1

Protection of traditional knowledge shall [should] last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 1.]

[Option 2

Duration of protection of traditional knowledge varies based upon the characteristics and value of traditional knowledge.]

ARTICLE 8

FORMALITIES

Option 1

8.1 The protection of traditional knowledge should [shall] not be subject to any formality.

Option 2

8.1 The protection of traditional knowledge requires some formalities.

[8.2 In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may [should/shall] maintain registers or other records of traditional knowledge.]

[ARTICLE 9

TRANSITIONAL MEASURES

- 9.1 These provisions apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article 1.

Option 1

- 9.2 The state should ensure the necessary measures to secure the rights [acknowledged by national [or] domestic law,] already acquired by third parties in accordance with its national law and its international legal obligations.

Option 2

- 9.2 Continuing acts in respect of traditional knowledge that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by these provisions, should be brought into conformity with these provisions within a reasonable period of time after they entry into force [, subject to respect for rights previously acquired by third parties in good faith].]

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Option 1

- [10.1 Protection under this instrument shall take account of, and operate consistently with, other international [and regional and national] instruments [and processes] [in particular 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].]

Option 2

- [10.1 [Protection under this instrument should leave intact] and should in no way affect the rights or the protection provided for in international legal instruments [in particular 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].]
- [10.2 Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples or local communities [or nations] / beneficiaries have now or may acquire in the future.]

Alternative

- 10.2 In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future.

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

[The rights and benefits arising from the protection of traditional knowledge under national/domestic measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a Member State [prescribed country] as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.]

National treatment as to all domestic law or national treatment as to laws specifically identified to fulfill these principles; or

Reciprocity; or

An appropriate means of recognizing foreign rights holders.

ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional knowledge is located in territories of different States / Member States [contracting Parties], those States / Member States [contracting Parties] should [shall] cooperate by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation should [shall] be done with the participation [and consent] / [and prior informed consent] of the traditional knowledge owners [holders].

Parties shall consider the need for modalities of a global mutual benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of traditional knowledge that occurs in transboundary situations for which it is not possible to grant or obtain prior informed consent.

[End of Annex and of document]