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**DRAFT ARTICLES PREPARED BY THE OPEN-ENDED DRAFTING GROUPS
AT IWG 2**

Article 1

Subject Matter of Protection

Definition of Traditional Knowledge

Para one: option one (open definition)

1. Traditional knowledge means knowledge 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].

Para one: option 2

Traditional Knowledge is dynamic and evolving. It is the result of the intellectual activities in diverse traditional contexts, including knowledge, skills, innovations, practices and teachings in a collective framework of [indigenous peoples and local communities].

Traditional Knowledge is part of a collective, ancestral, territorial, spiritual, cultural, intellectual and material heritage.

Traditional Knowledge is transmitted from generation to generation in diverse forms and is inalienable, indivisible and imprescriptible.

Traditional Knowledge is intrinsically linked to biodiversity and sustains cultural, social and human diversity embodied in traditional lifestyles.

Criteria for eligibility

Para two: option one

2. Protected traditional knowledge is knowledge that is:
 - a. The unique product of or is [distinctively] associated with an indigenous people or local community; and
 - b. Collectively developed, held, and maintained and is transmitted in a traditional and intergenerational context; and
 - c. Integral to the cultural identity of an indigenous people or local community.

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.

Para two: option one +

- d. [Not made widely known outside that community]
- e. [Not the application of principles, rules, skills normally, and generally, well known]

Para two: option two

2. [Protected traditional knowledge is knowledge that is:] / [Protection should be extended to traditional knowledge that:]

- a. [Where the knowledge is [unique to] [characteristic of] or is distinctively associated with] The [unique] [product][expression of knowledge] of or is distinctively associated with an [indigenous people or local community or communities or other distinctive groups] [indigenous peoples or local community or a small number of beneficiaries]; and
- b. Collectively [developed in a collaborative manner], [held] [preserved], and maintained and is [transmitted] [acquired] [orally, or codified using a system of symbols,] in a traditional and intergenerational context [in an interactive manner];
- c. [The property of the [indigenous peoples and local communities]]
- d. Integral to the cultural identity of an [indigenous people or local community].
- e. [Not made widely known outside that community with their free prior and informed consent of the [indigenous peoples and local communities] on mutually agreed terms]
- f. [Traditional knowledge may have diverse qualities and are viewed in the collective and are shared within the community. They are traditional in nature, often sacred or holy, and are often secret.]
- g. [This traditional knowledge is part of the identity of one or more peoples [indigenous and local] given that sometimes this is shared knowledge more than one peoples and/or communities]
- h. [This traditional knowledge is recognized by the [indigenous and local peoples and communities] so that they may exercise this knowledge and that they may exercise the custody of this knowledge and conserve it. There is a cultural responsibility that is recognized within customary law and practice.]

Para two: option three

2. Protection shall be extended to traditional knowledge that satisfies the following:

- (i) collectively generated, preserved and transmitted in a traditional and intergenerational context

- (ii) distinctively associated with a recognized [local or traditional community]
- (iii) integral to the cultural identity of a [local or traditional community] 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
- (iv) secret, sacred and embodied rituals.

Secret Traditional Knowledge

Proposed paragraph three

3. [Protected secret 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 TK holders who generate, constitute, preserve, develop and transmit knowledge in a traditional or intergenerational context [in accordance with Article 1]. -Traditional knowledge holders include *inter alia* indigenous peoples, local communities [and nations].

Article 3 Scope of Protection

Option – 1

(1) The beneficiaries as defined in Article 2 shall/should have the exclusive rights to:

- a. control and exploit their TK
- b. authorize or deny the access and use of TK
- c. have a fair and equitable share of benefits arising from the use of their TK based on MAT
- d. prevent misappropriation and misuse; including any acquisitions, appropriation, use or exploitation of their TK, without their PIC and establishment of MAT
- e. Prevent the granting of IP rights involving the use of their TK without the mandatory disclosure as well as evidence of PIC and BS

OR

Prevent the granting of IP rights involving the use of their TK that does not disclose the people/ community of the knowledge and the country of origin of such people/community, as well as compliance with evidence of PIC and Benefit Sharing conditions. [mandatory disclosure requirement]

- f. prevent the use of TK beyond its traditional context without acknowledging the source of that TK; acknowledging and attributing the TK holder where known; and respecting the cultural norms and practices of its holders

(2) Contracting parties shall/should provide adequate and effective legal means/measures to ensure the application of these rights taking into account relevant customary laws and practices.

Need explanation for "exploitation"

OR

(1) The beneficiaries as determined by Article 2, shall/should have adequate and effective legal means/measures to exercise control over TK, to authorize the access and utilization of TK, to have a fair and equitable share of benefit arising out of utilization of TK and to prevent any unauthorized disclosure, use, or other exploitation and in particular any acquisitions, appropriation, or use that fails to meet the PIC of the holder or infringes the MAT.

(2) In respect of traditional knowledge there should/shall be measure to require that those using TK beyond its traditional context

- a. Acknowledge the source of TK
- b. Acknowledge and attribute the TK holder where known; and
- c. Use TK in manner that respect the cultural value of its holders

Option – 2

- (1) In respect of traditional knowledge which are kept secret, the beneficiaries as determined by Article 2, shall/should have adequate and effective legal means/ measures to prevent any unauthorized disclosure, use, or other exploitation. In particular such traditional knowledge should be protected against any acquisitions, appropriation, or utilization that fails to meet the PIC of the holder or infringes the MAT.
- (2) In respect of TK not widely known there should/shall be measures to require PIC and Benefit Sharing where TK is exploited commercially
- (3) In respect of traditional knowledge including that which is widely known there should/shall be measure to require that those using TK beyond its traditional context
 - a. Acknowledge the source of TK
 - b. Acknowledge and attribute the TK holder where known; and
 - c. Use TK in manner that respect the cultural value of its holders

Need explanation for (1) Secret knowledge; (2) Not widely known and (3) widely known

Article 4
Sanctions, Remedies and Exercise of Rights

1. Option 1

- a. Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures necessary to ensure the application of this instrument.
- b. Contracting Parties will take measures against the [willful or negligent] infringement of the economic and or moral interests of the beneficiaries sufficient to constitute a deterrent to further infringements.

Option 2

Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies [including criminal and civil remedies], should be available in cases of breach of the protection of the traditional knowledge.

Option 3 [Transferred from Group 5]

1. Contracting parties [shall/should] ensure that appropriate enforcement procedures are available under their laws so as to permit effective action against any act of misappropriation or misuse of traditional knowledge, including expeditious remedies which would constitute a deterrent to further misappropriation or misuse.
2. These procedures should be accessible, fair, equitable, appropriate and not burdensome for holders of traditional knowledge. They should also provide safeguards for legitimate third party interests and the public interest.

[Alternative Dispute Resolution]

Where a dispute arises between beneficiaries or between beneficiaries and users of a TK each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism recognized by international and or national or domestic law.

Article 5

Administration of Rights

1. There [shall/should] be an appropriate national or regional competent authority, or authorities, which, in consultation with the holders of traditional knowledge may include but is not limited to the following:

- (i) disseminating information about traditional knowledge and its protection,
- (ii) ascertaining whether prior informed consent has been obtained,
- (iii) supervising fair and equitable benefit-sharing; and
- (iv) assisting, where possible and appropriate, the holders of traditional knowledge in the use, exercise and enforcement of their rights over their traditional knowledge, including assisting in the maintenance of traditional knowledge databases.

2. The identity of the competent national or regional authority or authorities [shall/should] be communicated to the World Intellectual Property Organization.

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

Article 6

Exceptions and Limitations

1. Measures for the protection of Traditional knowledge should/shall:

Option 1

(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 laws of members states; and

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

Option 2

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 holders.

2. [In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.]

3. Option 1

Parties may adopt appropriate limitations or exceptions, provided that the use of traditional knowledge is compatible with fair practice, acknowledges the indigenous and local community where possible, and is not offensive to the indigenous or local community.

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

Option 2

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.

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

- [4. Except for secret traditional knowledge to the extent that any act would be permitted under national law in relation to technology or technical knowledge protected by patent law or trade secrecy law, such act shall not be prohibited by the protection of traditional knowledge, 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.]

Article 7
Term of Protection

Protection of traditional knowledge should last as long as the traditional knowledge fulfils the criteria of eligibility for protection according to article 1.

Article 8 Formalities

The protection of traditional knowledge shall not be subject to any formality.

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 / domestic law, already acquired by third parties.

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

Paragraph 10.1

Option 1: Protection under this instrument shall be consistent with relevant international agreements and processes, including the existing international intellectual property instruments

Option 2: Protection under this instrument shall take account of, and operate consistently with, other international and regional instruments and processes.

- (in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge); or
- (in case of traditional knowledge which relates to components of biological diversity, access to, and use of; that traditional knowledge (shall) should be consistent with national laws regulating access to those components of biological diversity (permission to) granting to access and/or use traditional knowledge does not apply (Permission to) access and/or (use) utilization of associated genetic resources and vice versa).

Paragraph 10.2

Nothing in this instrument may be construed as diminishing or extinguishing the rights of indigenous people have now or may acquire in the future.

Article 11
National Treatment

11.1 The protection available to beneficiaries and holders of traditional knowledge under the national measures or laws that give effect to these should be available to all eligible traditional knowledge holders who are nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits of protection to at least the same level as traditional knowledge holders who are nationals of the country of protection.

11.2 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.

Article 12

Trans-boundary Cooperation

Option 1

In instances where traditional knowledge is located in territories of different parties, those parties shall co operate by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation shall be done with the participation (and consent) of the TK holders.

Option 2 [Transferred from Group 4]

Where traditional knowledge is shared by different groups or by indigenous peoples and communities in several jurisdictions Contracting Parties should provide co-operation and assistance to facilitate the implementation of enforcement measures provided under this instrument.