

Version 3

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AT IWG 2**

Article 1

Subject Matter of Protection

Definition of traditional knowledge

Option one

1.1 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].

Option two

- 1.1 (a) 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];
- (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 and sustains cultural, social and human diversity embodied in traditional lifestyles.

Criteria for eligibility

Option one

2.1 [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];

ALT

- (a) distinctively associated with and customarily recognized as belonging to a [local or traditional community];

- (b) collectively generated, preserved and transmitted [from generation to generation] OR [in a traditional and intergenerational 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.

ALT

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

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

ALT

(c) integral to the cultural identity of a [local, indigenous or traditional peoples or communities] 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 two

(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 three

(a) to (c) above, plus;

(d) the property of the [indigenous peoples and local communities];

(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.]

Secret traditional knowledge

1.3. [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 holders of traditional knowledge who generate, preserve, and transmit knowledge in a traditional or intergenerational context [in accordance with Article 1].⁴ Holders of traditional knowledge include, but are not limited to, indigenous peoples, local communities [and **nations**].

Article 3

Scope of Protection

Option one

- 3.1 The beneficiaries of traditional knowledge protected under this instrument shall/should have the exclusive rights to:
- (a) control and exploit 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;
 - (d) prevent misappropriation and misuse, including any acquisitions, appropriation, use or exploitation of their traditional knowledge, without their prior and informed consent and establishment of mutually agreed terms;
 - (e) 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 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 shall/should provide adequate and effective legal means/measures to ensure the application of these rights taking into account relevant customary laws and practices.

Comment

For the purposes of this instrument, the term "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 two

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 cultural norms and practices of its holders

Option three

3.1 In respect of traditional knowledge which has not been disclosed by traditional knowledge holders outside the traditional/cultural context the beneficiaries of protected traditional knowledge shall/should have adequate and effective legal means /measures to prevent any unauthorized disclosure, use or other exploitation. Measures should be put in place with the aim of ensuring prior and informed consent is obtained for use of the traditional knowledge, and that any benefits arising from that use are shared in a fair and equitable way with the relevant traditional knowledge holders based on mutually agreed terms.

3.2 Measures should/shall also be put in place to ensure prior and informed consent is obtained for the commercial or industrial use of traditional knowledge and any benefits arising from that use are shared in a fair and equitable way where a user would not have reasonably been expected to know that the traditional knowledge had been previously disclosed.

3.3 In respect of protected traditional knowledge including that which has been disclosed outside the traditional context 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 cultural norms and practices of its holders

Article 4
Sanctions, Remedies and Exercise of Rights

- 4.1 Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures necessary to ensure the application of this instrument.

Option one

- 4.2 Contracting parties [shall/should] ensure that appropriate enforcement procedures are available under their laws 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 two

- 4.2 Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, should be available in cases of breach of the protection of the traditional knowledge 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.
- 4.3. 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.
- 4.4 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

5.1 A contracting party may, in consultation with the holders of traditional knowledge, establish an appropriate national or regional competent authority or authorities. The functions may include, but need not be limited to, the following:

- (a) disseminating information about traditional knowledge and its protection,
- (b) ascertaining whether prior informed consent has been obtained,
- (c) supervising fair and equitable benefit-sharing; and
- (d) 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,

5.2 Where traditional knowledge fulfils the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation of the traditional knowledge 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 right of traditional knowledge holders to administer their rights according to their customary protocols, understandings, laws and practices.

Article 6

Exceptions and Limitations

Option one

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 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 two

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 holders.

Option one

6.2 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.

Option two

6.2 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.

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

Article 7

Term of Protection

Option one

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

Option two

7.2 Duration of protection of traditional knowledge varies based upon the characteristics of traditional knowledge.

Article 8 Formalities

Option one

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

Option two

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 [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 one

9.2 The state should ensure the necessary measures to secure the rights acknowledged by national [or] domestic law, already acquired by third parties.

Option two

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 instruments and processes.

Option 2

10.1 Protection under this instrument should leave intact and should in no way affect the protection provided for in international legal instruments.

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 and other Means of Recognizing Foreign Rights and Interests

Comments

A prior basic question is whether or not domestic entitlements on traditional knowledge should be extended to foreign right holders or beneficiaries. Further consideration shall be given to existing choices for recognizing the rights of foreign right holders or beneficiaries including reciprocity and mutual recognition (See WIPO/GRTKF/IC/8/6 for a fuller discussion).

A secondary core question is whether existing domestic arrangements for protecting traditional knowledge, and the subsequent entitlements, would be extended to foreign right holders or beneficiaries. Certainly foreign traditional knowledge holders and beneficiaries who experience an abuse of their rights should be entitled to protection of their rights, as set out in this instrument. The issue is the extent to which they could gain access to entitlements recognized in the domestic regimes. For example, in country X, the unique situation of forest dwellers is recognized with specific domestic traditional knowledge protections. Should that unique concession be extended to foreign right holders as they would not apply beyond the particular group for which the protections were designed?

Discussion on conflicts of law is also encouraged by the group in the terms included in article 8.3 of the TCE's text (WIPO/GRTKF/IC/18/4).

Article 12
Trans-boundary Cooperation

12.1 In instances where traditional knowledge is located in territories of different contracting Parties, those contracting 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 traditional knowledge holders.