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DRAFT ARTICLES ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AS PREPARED
BY THE OPEN-ENDED INFORMAL DRAFTING GROUP ON TRADITIONAL KNOWLEDGE
AT IGC 18

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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 The contracting parties commit themselves to implementing 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 to carry out cultural expertise that would take into account customary laws, protocols and community procedures, so as to settle disputes.

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 or protection granted by the this instruments 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 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 roles and procedures of the national legislature 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 would incorporate at its headquarters the regional authorities of the indigenous peoples for their approval.

