

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

PROTECTION OF TRADITIONAL KNOWLEDGE

SUMMARY OF DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES

*This paper reproduces Annex I of document WIPO/GRTKF/IC/7/5. These draft materials are put forward as one input only to facilitate continuing consideration and discussion of possible approaches to the Committee's work in preparing an overview of policy objectives and core principles. These are discussed and elaborated further in the full document.*

I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

*[Recognize value]*

(i) recognize the intrinsic value of traditional knowledge, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial and educational value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that benefit all humanity;

*[Promote respect]*

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

*[Meet the actual needs of holders of traditional knowledge]*

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, and contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to the progress of science and the useful arts;

*[Empower holders of TK]*

(iv) be undertaken in a manner inspired by the protection provided for intellectual creations and innovations, that is balanced and equitable and that effectively empowers traditional knowledge holders to exercise due authority over their own knowledge, including appropriate moral and economic rights;

*[Support traditional knowledge systems]*

(v) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

*[Contribute to safeguarding traditional knowledge]*

(vi) contribute to the preservation and safeguarding of traditional knowledge and the customary means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, for the direct

benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

*[Repress unfair and inequitable uses]*

(vii) repress the misappropriation of traditional knowledge and other unfair commercial activities;

*[Concord with relevant international agreements and processes]*

(viii) recognize, 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, that recognize farmers' rights, and that mitigate the effects of drought in countries experiencing serious drought or desertification;

*[Promote innovation and creativity]*

(ix) encourage, reward and protect tradition-based creativity and innovation, particularly when desired by traditional knowledge holders; and promote innovation and the transfer of technology to the mutual advantage of holders and users of traditional knowledge;

*[Promote intellectual and technological exchange]*

(x) promote access to and the wider application of traditional knowledge on fair and equitable terms, for the general public interest and as a means of sustainable development, in coordination with existing international and national regimes governing access to and use of genetic resources;

*[Promote equitable benefit sharing]*

(xi) promote the fair and equitable distribution of the monetary and non-monetary benefits arising from use of traditional knowledge, consistent with other applicable international regimes;

*[Promote community development and legitimate trading activities]*

(xii) promote the use of traditional knowledge for community-based development, recognizing traditional knowledge as an asset of its holders; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries;

*[Preclude the grant of invalid IP rights]*

(xiii) curtail the grant or exercise of invalid intellectual property rights over traditional knowledge and associated genetic resources;

*[Enhance transparency and mutual confidence]*

(xiv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational and other users of traditional knowledge on the other;

*[Complement protection of traditional cultural expressions]*

(xv) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.

## II. CORE PRINCIPLES

### A. General guiding principles

*[These principles should be respected to ensure that the specific principles concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection. Each principle is followed here by a brief description of the possible effect of the principle; a more complete description is provided in Annex II of document WIPO/GRTKF/IC/7/5]*

#### *A1: Principle of responsiveness to the needs and expectations of TK holders*

Protection should reflect the aspirations and expectations of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by traditional knowledge holders; and recognize the inseparable quality of traditional knowledge and cultural expressions for many communities.

#### *A2: Principle of recognition of rights*

The rights of traditional knowledge holders to the effective protection of their knowledge against misuse and misappropriation should be recognized.

#### *A3: Principle of effectiveness and accessibility of protection*

Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of TK holders. National authorities should make available appropriate enforcement procedures that permit effective action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.

#### *A4: Principle of flexibility and comprehensiveness*

1. Protection should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives.
2. Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws. Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for traditional knowledge holders.

#### *A5: Principle of equity and benefit sharing*

1. Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TK, and of those who use and benefit from TK; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests.

2. Holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.

*A6: Principle of consistency with existing legal systems*

1. The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law, if any, governing access to those resources and the sharing of benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.

2. Traditional knowledge protection should be consistent with, and supportive of, existing IP systems and should enhance the applicability of relevant intellectual property systems to traditional knowledge subject matter in the interests of holders of traditional knowledge and consistently with the broader public interest. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each under the Paris Convention and other international intellectual property agreements.

*A7: Principle of respect for and cooperation with other international and regional instruments and processes*

1. Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already established under binding legal instruments.

2. Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.

*A8: Principle of respect for customary use and transmission of traditional knowledge*

Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, as far as possible and as appropriate and subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework.

*A9: Principle of recognition of the specific characteristics of traditional knowledge*

Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community.

## B. Specific substantive principles

### B1: *Protection against misappropriation*

#### *[Suppression of misappropriation]*

1. Traditional knowledge shall be protected against misappropriation.

#### *[General nature of misappropriation]*

2. Any acquisition or appropriation of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition or appropriation of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

#### *[Acts of misappropriation]*

3. In particular, legal means should be available to suppress:

(i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;

(ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;

(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter by a person who knew that the intellectual property rights were not validly held in the light of that traditional knowledge and any conditions relating to its access; and

(iv) commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge.

#### *[General protection against unfair competition]*

4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10*bis* of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge.

*[Recognition of the customary context]*

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

*B2: Legal Form of Protection*

1. Protection may be implemented through a special law on traditional knowledge; the laws on intellectual property, including unfair competition law and the law of unjust enrichment; the law of torts, liability or civil obligations; criminal law; laws concerning the interests of indigenous peoples; regimes governing access and benefit-sharing; or any other law or a combination of any of those laws.

2. The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.

*B3: General scope of subject matter*

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking to define the diverse and holistic conceptions of knowledge within the traditional context.

2. For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

*B4: Eligibility for protection*

Protection should be extended at least to that traditional knowledge which is:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility, such as a sense of obligation to preserve, use and transmit the knowledge appropriately, or a sense that to permit misappropriation or demeaning usage would be harmful or offensive; this relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.

#### *B5: Beneficiaries of protection*

Protection of traditional knowledge should be for the principal benefit of the holders of knowledge in accordance with the relationship described under ‘eligibility for protection.’ Protection should in particular benefit the indigenous and traditional communities and peoples that develop, maintain and identify culturally with traditional knowledge and seek to pass it on between generations, as well as recognized individuals within these communities and peoples. Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples. Benefits from protection should be appropriate to the cultural and social context, and the needs and aspirations, of the beneficiaries of protection.

#### *B6: Equitable compensation and recognition of knowledge holders*

1. Commercial or industrial use of traditional knowledge should be subject to just and appropriate compensation for the benefit of the traditional holder of the knowledge, when such use has gainful intent and confers a technological or commercial advantage, and when compensation would be consistent with fairness and equity in relation to holders of the knowledge, in view of the circumstances in which the user acquired the knowledge. Liability for compensation should, in particular, arise where the knowledge was accessed or acquired in a manner that creates a reasonable expectation that benefits from such use should be shared equitably, and where the user is aware of the distinctive association of the knowledge with a certain community or people. Compensation should be in a form that responds to the express needs of the TK holders and is culturally appropriate.
2. Use of traditional knowledge for non-commercial purposes need not incur an obligation for compensation, but suitable benefit-sharing from such uses should be encouraged, including access to research outcomes and involvement of the source community in research and educational activities.
3. Those using traditional knowledge beyond its traditional context should make every reasonable endeavor to identify the source and origin of the knowledge, to acknowledge its holders as the source of the traditional knowledge, and to use and refer to the knowledge in a manner that respects and acknowledges the cultural values of its holders.

#### *B7: Principle of Prior Informed Consent*

1. The principle of prior informed consent should govern any direct access or acquisition of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.
2. Legal systems or mechanisms for obtaining prior informed consent should ensure legal certainty and clarity; should not create burdens for traditional holders and legitimate users of traditional knowledge; should ensure that restrictions on access to traditional knowledge are transparent and based on legal grounds; and should provide for mutually agreed terms for the equitable sharing of benefits arising from the use of that knowledge.
3. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.

#### *B8: Exceptions and limitations*

1. The application and implementation of protection of traditional knowledge should not adversely affect:

- (i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;
- (ii) the use of traditional medicine for household purposes, use in government hospitals, or for other public health purposes; and
- (iii) other fair use or fair dealing with traditional knowledge, including use of traditional knowledge in good faith that commenced prior to the introduction of protection.

2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is 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.

*B9: Duration of protection*

Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills the criteria of protection, in particular as long as it is maintained by traditional knowledge holders, remains distinctively associated with them and remains integral to their collective identity. Possible additional protection against other acts, which may be made available by relevant national or regional laws or measures, shall specify the duration of protection under those laws or measures.

*B10: Application in time*

Protection of traditional knowledge newly introduced in accordance with these principles should be applied to new acts of acquisition, appropriation and use of traditional knowledge. Recent acquisition or uses of traditional knowledge should be regularized as far as possible within a certain period of that protection coming into force, subject to equitable treatment of rights acquired by third parties in good faith. Long-standing prior use in good faith may be permitted to continue, but the user should be encouraged to acknowledge the source of the traditional knowledge concerned and to share benefits with the original holders of the knowledge.

*B11: Formalities*

1. Eligibility for protection of traditional knowledge against acts of misappropriation and other acts of unfair competition should not require any formalities.
2. In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may maintain registers or other records of traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of traditional knowledge holders. Such registers may be associated with specific forms of protection, and should not compromise the status of hitherto undisclosed traditional knowledge or the interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.

*B12: Consistency with the general legal framework*

1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws regulating access to those components of biological diversity. Permission to access traditional knowledge does not imply permission to use associated genetic resources and vice versa.



2. Traditional knowledge protection should be consistent with existing intellectual property systems and supportive of the applicability of relevant international intellectual property standards to the benefit of holders of traditional knowledge.

3. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each other under the Paris Convention and other international intellectual property agreements.

*B13: Administration and enforcement of protection*

1. An appropriate national or regional authority, or authorities, should be competent for:

(i) distributing information about traditional knowledge protection and conducting public awareness and advertising campaigns to inform traditional knowledge holders and other stakeholders about the availability, scope, use and enforcement of traditional knowledge protection;

(ii) determining whether an act pertaining to traditional knowledge constitutes an act of misappropriation of, or an other act of unfair competition in relation to, that knowledge;

(iii) determining whether prior informed consent for access to and use of traditional knowledge has been granted;

(iv) determining equitable compensation; determining whether a user of traditional knowledge is liable to pay equitable compensation; and, if the user is liable, as appropriate, facilitate and administer the payment and use of equitable compensation;

(v) determining whether a right in traditional knowledge has been acquired, maintained, or infringed, and for determining remedies;

(vi) assisting, where possible and appropriate, holders of traditional knowledge to acquire, use, exercise and enforce their rights over their traditional knowledge.

2. Measures and procedures developed by national and regional authorities to give effect to protection in accordance with these Principles should be fair and equitable, should be accessible, appropriate and not burdensome for holders of traditional knowledge, and should provide safeguards for legitimate third party interests and the interests of the general public.

*B14: International and Regional Protection*

Legal and administrative mechanisms should be established to provide effective protection in national systems for the traditional knowledge of foreign rightsholders. Measures should be established to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of traditional knowledge holders in foreign countries.