



AFRICAN REGIONAL INTELLECTUAL PROPERTY  
ORGANIZATION (ARIPO)

# Explanatory Guide to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore



**Explanatory Guide to the Swakopmund  
Protocol on the Protection of Traditional  
Knowledge and Expressions of Folklore**

**ARIPO SECRETARIAT  
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## LIST OF ACRONYMS USED IN THE GUIDE

<b>Acronym</b>	<b>Meaning</b>
<b>AIPO</b>	African Intellectual Property Organization
<b>ARIPO</b>	African Regional Intellectual Property Organization
<b>AU</b>	African Union
<b>CBD</b>	Convention on Biological Diversity
<b>EoF</b>	Expressions of folklore
<b>FAO</b>	Food and Agriculture Organization
<b>GRs</b>	Genetic resources
<b>ICH</b>	Intangible Cultural Heritage
<b>IGC</b>	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
<b>IP</b>	Intellectual property
<b>ITPGRFA</b>	International Treaty on Plant Genetic Resources for Food and Agriculture
<b>PGRFA</b>	Plant genetic resources for food and agriculture
<b>PIC</b>	Prior informed consent
<b>TK</b>	Traditional knowledge
<b>UNECA</b>	United Nations Economic Commission for Africa
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>WIPO</b>	World Intellectual Property Organization
<b>WTO</b>	World Trade Organization

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## INTRODUCTION AND OVERVIEW

### Purpose of the Guide

The guide is intended to provide assistance to government officials and policy makers to develop national laws for the protection of traditional knowledge (TK) and expressions of folklore (EoF) based on the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (the Protocol). The guide may also be useful to local and traditional communities, academics, practitioners, students and other interested parties. This guide is neither part of the Protocol, nor does it constitute an instrument providing authoritative legal interpretation. Rather, it is intended to facilitate the application of the provisions contained in the Protocol.

TK refers to the content or substance of knowledge resulting from intellectual activity in a traditional context and includes innovations, skills, know-how, practices and learning. It is not limited to any specific technical field, and may include, for example, agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources. TK is often distinctively associated with a local or traditional community, collectively owned, and transmitted orally in an intergenerational context. It reflects a community's identity, history, culture, and social and spiritual values.

EoF refer to any forms, tangible or intangible, in which traditional culture and knowledge are expressed, communicated or manifested. They are collectively owned, and transmitted orally in an intergenerational context. EoF reflect a commu-

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nity's cultural and social identity and values. Forms of EoF may comprise:

- *verbal expressions*, such as stories, epics, legends, poetry, riddles and other narratives such as signs, words, symbols and names;
- *musical expressions*, such as songs and instrumental music;
- *expressions by movement*, such as dances, plays, rituals and other performances, whether or not reduced to a material form; and
- *tangible expressions*, such as productions of art, in particular, drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments and architectural forms.

TK can be associated with EoF, for example, a traditional tool may embody TK and at the same time be seen as an EoF by virtue of its design. Many communities view TK and EoF as interlinked and inseparable.

Genetic resources (GRs) refer to genetic material of actual or potential value, with genetic material being “[a]ny material of plant, animal, microbial or other origin containing functional units of heredity.”<sup>1</sup> Local and traditional communities have coexisted with GRs for centuries. Through trial and error, communities have acquired significant knowledge regarding GRs, which have been transmitted through generations. GRs are frequently sought after as

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<sup>1</sup> See Convention on Biological Diversity, Article 2. Units of heredity include genes or chromosomes, which perform a function and are passed on through replication or reproduction.

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sources of new biochemical compounds for drug, chemical and agricultural products. The development of many of these products would not have been possible without TK, that is, the specific knowledge associated with the GRs. For example, the San people have for centuries used the bitter flesh of the Hoodia plant to suppress hunger and thirst during long trips across their hostile land.

Based on that TK, the South African Council for Scientific and Industrial Research has patented an appetite suppressant derived from a species of Hoodia.<sup>2</sup>

## Historical Background to the Adoption of the Protocol

The Protocol is a regional *sui generis*<sup>3</sup> instrument. It was developed by the African Regional Intellectual Property Organization (ARIPO) to protect TK and EoF and to align its initiatives regarding the protection of TK and EoF with those taking place in the World Intellectual Property Organization (WIPO).<sup>4</sup> The Protocol establishes statutory rights in relation to TK and EoF and provides a basis for African countries wishing to enact legislation for their protection. It will come into force three months after six States have deposited instruments of ratification or accession.

ARIPO was created by the Lusaka Agreement which was concluded on December 9, 1976, in Lusaka, Zambia. In

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<sup>2</sup> R. Wynberg, 'Rhetoric, Realism and Benefit Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant', 7(6) *Journal of World Intellectual Property* (2004) 851-876.

<sup>3</sup> In this context, an intellectual property (IP) *sui generis* instrument refers to an IP instrument, the features of which would be modified to address specific policy needs and/or characteristics of specific subject matter, such as TK and EoF.

<sup>4</sup> WIPO is a specialized United Nations agency. Its mission is to promote innovation and creativity for the economic, social and cultural development of all countries through a balanced and effective international intellectual property system.

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order to give substantive activities to the organization, two protocols were subsequently adopted, namely the Harare Protocol (patents and industrial designs) of December 10, 1982, and the Banjul Protocol (trademarks and service marks) of November 19, 1993. However, neither protocol specifically addressed the protection of TK or EoF. The increase in biopiracy and misappropriation of TK and EoF, resulting from the absence of legal protection, led ARIPO and its Member States to discuss ways to address these challenges.

In 1998 and 1999, WIPO conducted nine fact-finding missions across the world to identify the IP-related needs and expectations of the holders of TK and EoF. Following the fact-finding missions, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in October 2000. The IGC is an intergovernmental forum undertaking negotiations aimed at reaching an agreement on the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and EoF.

The process of creating a regional legal framework for the protection of African TK and EoF formally began in August 2000. At its Seventh Session, held in Ezulwini, Swaziland, on August 24-25, 2000, ARIPO's Council of Ministers mandated the ARIPO Office to take initiative on the protection of indigenous knowledge, and to link such initiative with the work carried out in WIPO. The Council of Ministers resolved that "in view of the need of a coordinated strategy to deal with the problem of the protection of indigenous knowledge, [ARIPO] should take initiatives on [TK] and link

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its initiatives with those undertaken by [WIPO]”.<sup>5</sup> This mandate was extended by the Council of Ministers at its Eighth Session held in Mangochi, Malawi, in 2002 to enable the Organization to address the issues of GRs, TK and EoF in a concerted and coordinated manner. Consequently, from 2002, ARIPO began drafting a legal document providing for the protection of TK and EoF.

At the IGC’s Sixth Session on March 15-19, 2004, it was proposed by the African group that ARIPO should develop a regional legal mechanism to protect TK, EoF and GRs because much of Africa’s knowledge is multicultural and trans-boundary.<sup>6</sup> Therefore, ARIPO considered it essential to draft an instrument that addressed these issues. In 2004, at the IGC’s Seventh Session, ARIPO requested technical assistance from WIPO for the preparation of a concept paper on the legal and policy options for the protection of TK and EoF.

Following a series of national and regional consultations, as well as expert reviews, ARIPO developed a document entitled ‘Draft ARIPO Legal Instrument on the Protection of Traditional Knowledge and Expressions of Folklore’ which was launched during the Thirtieth Session of the Administrative Council of ARIPO in Maputo, Mozambique, in 2006. The document was later endorsed by the Council of Ministers in 2007. After a decade of negotiating and drafting, ARIPO and its Member States adopted the Protocol on August 9, 2010, at the Diplomatic Conference of Swakopmund, Namibia.

## **Aims and Importance of the Protocol**

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<sup>5</sup> Council of Ministers, Seventh Session, held in Ezulwini, Kingdom of Swaziland, from August 24 to 25, 2000.

<sup>6</sup> ARIPO was instrumental in drafting the proposal.

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For decades, Africa’s natural and cultural resources have contributed to the advancement of art, science and technology. The biotech, pharmaceutical and health care industries frequently look to TK and GRs as sources of new biochemical compounds for drug, chemical and agricultural products. Similarly, companies have looked to TK and EoF for inspiration to create new products and distinguish existing ones. Growing interest in TK, GRs and EoF has led to cases of misuse, misappropriation, and unauthorized exploitation. In some instances, third parties have made important profits from such exploitation. However, the communities that have generated, maintained and transmitted the TK and EoF have received few benefits. Often, even IP rights have been granted to third parties for creations and innovations that were based on TK and EoF.

Because they are “traditional”, TK and EoF cannot be fully protected by the existing IP system due to inherent inadequacies in the system, such as the requirements of originality or novelty. Intellectual property rights such as copyright and patents do not normally recognize collective ownership.<sup>7</sup> Furthermore, the protection provided by conventional IP rights is often limited in time whereas many holders of TK and EoF would like to see their right protected in perpetuity.<sup>8</sup>

The Protocol aims to address these deficiencies. It grants protection to TK and EoF by providing the necessary tools to prevent the misappropriation of the traditional and cultural

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<sup>7</sup> Some IP rights such as collective marks, certification marks, geographical indications and even regular trademarks allow for collective rights, and can be used by communities for the protection of TK or EoF.

<sup>8</sup> It is important to note that some IP rights such as trademark or certification marks can provide protection that is unlimited in time, provided that the registration of the mark is renewed and continues to fulfill the requirements for protection.

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knowledge and heritage of Africa. The Protocol incorporates elements of traditional customary law and human rights law, along with elements of the IP system.

The objectives of the Protocol are to:

- affirm the principle that local and traditional communities are the beneficiaries and rightful holders of their TK and EoF;
- provide legal protection against the unlawful exploitation, misappropriation and infringement of knowledge beyond its traditional context;
- empower the holders with legal certainty to exercise and manage their inalienable rights;
- facilitate for the holders the utilization of their knowledge for socio-economic development and wealth creation;
- prevent bioprospecting without prior informed consent and mutually-agreed terms and facilitate fair and equitable benefit-sharing mechanisms;
- preserve cultural heritage and diversity; and
- enable ARIPO to register knowledge that is trans-boundary and multicultural in nature.

## **Summary of the Main Provisions**

The Protocol consists of four parts: Part I comprises the preliminary provisions, Part II deals with the protection of TK, Part III addresses the protection of EoF, and Part IV consists of general provisions. The principle underpinning the Protocol is the empowerment of the holders of TK and EoF to exercise their rights over their knowledge. The Protocol provides both positive and defensive protection for TK and EoF. Positive protection entails the creation of rights that

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empower the holders of TK and EoF to exclude others from using their protected knowledge. Defensive protection ensures that IP over the knowledge is not granted to unauthorized third parties.

Although TK and EoF present some similarities, they are addressed separately in the Protocol. This is because the protection of TK and EoF raises different legal and policy issues, and are subject to different forms of exploitation, necessitating specific solutions.<sup>9</sup> However, it is acknowledged that from a local or traditional community's perspective, TK and EoF are perceived as vital elements of a holistic traditional and cultural identity subject to the same body of customary laws and practices.

To meet the definition of TK and EoF, and thereby be eligible for protection under the Protocol, the knowledge should be distinctively associated with a local or traditional community, collectively owned and preserved and transmitted in a traditional and intergenerational context. The beneficiaries of TK are identified as local and traditional communities or recognised individuals within these communities; however, beneficiaries of EoF are limited to local and traditional communities. The Protocol's scope of protection extends to both TK and EoF and includes economic and moral-types of rights.<sup>10</sup> For example, rights granted in relation to TK include the exclusive right to authorise the exploitation of TK and to prevent anyone from exploiting the TK without prior informed consent.

Exploitation, in turn, includes acts such as manufacturing,

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<sup>9</sup> W. Wendland, 'Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions', p. 328 in B. T. Hoffman, *Art and Cultural Heritage: Law, Policy and Practice*, 2006.

<sup>10</sup> Economic rights are associated with monetary benefits that arise from the lawful exploitations of an author's works, whereas moral rights enable the author/s to be associated with their work. They are viewed as an extension of the author and therefore s/he has the right to prevent any alterations that may distort her/his work, image or honour.

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importing, exporting or offering for sale traditional knowledge products. EoF, on the other hand, shall be protected against acts of misappropriation, misuse and unlawful exploitation, such as the unauthorised reproduction, publication, public performance, distribution, adaptation, distortion or derogatory use. TK and EoF are not subject to any formalities under the Protocol, therefore protection is automatic. However, in the interests of transparency, evidence and preservation, TK and EoF may be registered with national competent authorities (national authorities) and with the ARIPO Office. Protection will be afforded to TK and EoF for as long as such knowledge fulfils the protection criteria. However, where TK exclusively belongs to an individual, protection will be limited to a period of 25 years following the exploitation of knowledge beyond its traditional context. After the expiration of the 25 years, the knowledge becomes part of the community's knowledge and will be subject to the provisions of the Protocol. The Protocol provides for a number of exceptions and limitations. An exception to the protection of TK under the Protocol is that its holders may continue to use the TK, provided that its use is within a traditional context. The protection of EoF also allows certain exceptions for non-commercial uses and national authorities can make special provisions regarding the use of EoF by their citizens.

Although the Protocol mentions GRs, it does not address IP issues in relation to the access and use of GRs. ARIPO has a separate draft policy framework dealing with access and benefit-sharing arising from the use of GRs, which is complementary to the Protocol.

## **Steps towards Ratification or Accession**

In order for the Protocol to enter into force, six states have to deposit instruments of ratification (for signatories) or accession (for non-signatories). Any Member State of ARIPO,

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the African Union (AU) or the United Nations Economic Commission for Africa (UNECA) may become a party to the Protocol. States wishing to ratify or to accede to the Protocol will need to understand their obligations under the Protocol before they can commence ratification or accession.

Depending on their legislative system, some Swakopmund Protocol Contracting States may be required to incorporate the Protocol into national law for it to have national legal effect. Such incorporation may help prevent inconsistencies between the Protocol and national laws. In these states, the Protocol will need to be approved and adopted by the executive or the national legislature. However, in other Contracting States the incorporation of the Protocol into national law may not be required.

After the Contracting State has fulfilled the requirements under the Protocol, it will deposit its instruments of ratification or accession with the Government of the Republic of Zimbabwe, where ARIPO is based. The Government of the Republic of Zimbabwe will notify all Contracting States of any deposits of instruments of ratification or accession. The ratification or accession of the Protocol by any state implies acceptance of the Lusaka Agreement and thereby becoming an ARIPO Member State, i.e., if not already a member.

States may consider the following steps when ratifying or acceding to the Protocol:<sup>11</sup>

- Step 1* -Consideration of the policy and practical implications, and of the institutional mechanisms relevant to ratifying or acceding to the Protocol;
- Step 2* -Engagement of the legislative or executive authorities towards ratification or accession;
- Step 3* -Deposit of the instruments of ratification or

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<sup>11</sup> These steps have been used in the ratification or accession of various United Nations international treaties such as the Rotterdam Convention.

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accession;  
Step 4 - Implementation of the Protocol;  
Step 5 - Conducting of awareness-raising activities.

## The Protocol within the Broader Institutional Context

The protection of TK and EoF involves important policy issues within and beyond the domain of IP, and work on these issues is currently undertaken by various regional and international bodies and processes. These include, amongst others, work undertaken by WIPO, in particular the IGC; the Convention on Biological Diversity (CBD); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the United Nations Food and Agriculture Organization (FAO), and the World Trade Organization (WTO). The policy objectives and principles relevant to the protection of TK and EoF discussed in international or regional organizations are reflected in the Protocol.

**WIPO** - The text of the Protocol is inspired by the work that has been taking place in WIPO in relation to TK and EoF and, in particular, during the negotiations that take place in the IGC.<sup>12</sup> As a consequence, there are many similarities between the Protocol and the IGC Draft Articles on TK and EoF, both in terms of content and structure. For example, both the IGC Draft Articles and the Protocol address key issues such as the definition of TK and EoF, the beneficiaries of protection, the scope of protection, the formalities, the term of protection, the exceptions and limitations, and the administration of the rights.

**CBD** - The CBD<sup>13</sup> is the first international instrument that explicitly addresses biodiversity-related TK. It does so in

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<sup>12</sup> See WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/17/4 (2010) and WIPO/GRTKF/IC/18/4. A. Lucas-Schloetter, 'Folklore' in S. Von Lewiniski (ed.), *Indigenous Heritage and Intellectual Property* (Kluwer Law International, The Hague, 2nd edition, 2008) p. 468.

<sup>13</sup> The CBD was adopted on June 5, 1992, at the Earth Summit Conference in Rio de Janeiro and came into force on December 29, 1993. Presently, there are 193 parties to the CBD.

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Article 8(j), but only limits protection to knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Consequently, other types of TK and EoF are excluded from protection under the CBD. The CBD and the Protocol both encourage the equitable sharing of the benefits arising from the utilization of such knowledge. However, protection of TK under the CBD is limited when compared to the Protocol. The Protocol assures the protection of TK and obliges its Contracting States to undertake measures that will achieve such protection. Under the CBD, the protection of TK is left to the discretion of the CBD contracting states and it does not specifically mention protection but merely calls on states to “respect, preserve and maintain” TK.

**WTO** - The Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPs Agreement)<sup>14</sup> is an international agreement that establishes minimum standards of protection for IP, and makes protection of IP rights an integral part of the multilateral trading system of the WTO. The TRIPs Agreement does not contain specific provisions on TK, however, some of its provisions, and in particular those on geographical indications,<sup>15</sup> patents,<sup>16</sup> and trade secrets<sup>17</sup> may also apply to TK-based goods and services. The Protocol, on the other hand, is tailored to safeguard the interests of local and traditional communities and grants them explicit rights in relation to TK and EoF.

**FAO** - The International Treaty on Plant Genetic Resources

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<sup>14</sup> Entered into force on January 1, 1995.

<sup>15</sup> Articles 23-24 of the TRIPs Agreement.

<sup>16</sup> Articles 27-34 of the TRIPs Agreement.

<sup>17</sup> Article 39 of the TRIPs Agreement.

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for Food and Agriculture (ITPGRFA)<sup>18</sup> provides for the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA), and the fair and equitable sharing of the benefits arising from their use. The treaty covers plant genetic resources and TK relevant to PGRFA. It establishes a Multilateral System for Access and Benefit-Sharing to facilitate access to PGRFA and to share the benefits in a fair and equitable way. It provides in Part III for the recognition of farmers' rights, including "the protection of traditional knowledge relevant to plant genetic resources food and agriculture". Although the subject matter addressed by the Protocol is wider than that of the ITPGRFA, they both acknowledge the enormous contribution made by local and traditional communities and encourage their participation in decision-making.

**UNESCO** - UNESCO has instigated the protection of cultural heritage through the Convention for the Safeguarding of the Intangible Cultural Heritage (ICH).<sup>19</sup> Although the ICH Convention aims to safeguard EoF, it focuses only on intangible heritage. Both the Protocol and ICH Convention articulate protection from a holistic perception i.e. they recognize the inter-linkage between the land, environment, cultures, TK and ecology as intrinsically intertwined. Unlike the Protocol, the ICH Convention does not provide comprehensive protection for the local and traditional communities because it safeguards and preserves intangible EoF, rather than actively protecting them from exploitation through defensive or positive measures. Under the ICH, states rather than local or traditional communities largely control EoF.

At the regional level, a similar initiative to that of ARIPO was developed by African Intellectual Property Organization (AIPO), a sister organization dealing with intellectual proper-

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<sup>18</sup> The ITPGRFA was adopted in November 2001, and came into force in June 2004.

<sup>19</sup> The ICH entered into force in April 2006.

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ty matters in mainly the French-speaking countries in Central and West Africa. These initiatives uphold the desirability of the majority of Sub-saharan African states to protect the rights of traditional and local communities to their knowledge, innovations and practices. In addition, the AU has adopted 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' (African Model Law)<sup>29</sup> to advance the protection of TK in Africa and to provide a basis for national law. Like the Protocol, the African Model Law ensures the effective participation of local or traditional communities and provides appropriate institutional mechanisms for the effective implementation and enforcement of their rights. Both documents stipulate that prior informed consent is needed from the concerned community before access to biological resources or knowledge is granted. Other regional initiatives include the 2002 Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture of the Secretariat of the Pacific Community, and the Decision 486 of 2000 of the Andean countries on a Common Intellectual Property Regime.

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<sup>29</sup> The African Model Law was adopted in 2000 by the AU.

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# COMMENTARY ON THE PROVISIONS OF THE PROTOCOL

## PART I: PRELIMINARY PROVISIONS

### *Preamble*

The preamble outlines the general aspirations of ARIPO Member States and the rationale for protection. It highlights the importance and value of TK systems and their contribution to local and traditional communities, as well as “all humanity”. It acknowledges the need to respect, recognize and protect Africa’s cultural knowledge and heritage, and to encourage and reward creativity of local and traditional communities. In addition, the preamble emphasises the need to tailor legal protection to the specific characteristics of TK and EoF, including their collective or community context.

### *Section 1 – Purpose of Protocol*

The purpose of the Protocol is to protect TK holders against breaches of their rights as affirmed by the Protocol and to protect EoF against misappropriation, misuse and unlawful exploitation, where such uses occur beyond their traditional context. The Protocol should not be interpreted in a manner that will limit or seek to define the diverse and holistic notions of TK or EoF. This is because TK and EoF are not fixed in time. They are dynamic and are constantly evolving.

### *Section 2 – Definitions*

This section provides definitions for some of the key terms that are used in the Protocol. These terms include “appropriate authority”, “ARIPO Office”, “Contracting State”,

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“customary laws and practices”, “community”, “national competent authority”, “expressions of folklore” and “traditional knowledge”, as described above. “Prior Informed Consent” (PIC) is also defined in this section. It refers to the approval given in advance by the local or traditional communities, to prospective users, to use their TK or EoF. Prospective users should provide complete and accurate information about the intended use of the knowledge, so that communities can make an informed decision based on that information.

### ***Section 3 – National Competent Authority***

This section instructs Contracting States to designate or establish a national authority that will be responsible for the implementation of the Protocol.

## **PART II: PROTECTION OF TRADITIONAL KNOWLEDGE**

### ***Section 4 – Protection Criteria for Traditional Knowledge***

This section establishes the characteristics that TK must have in order to be protectable under the Protocol. In particular, TK must be “generated, preserved and transmitted in a traditional and intergenerational context”; it must be “distinctively associated with a local or traditional community”, and it must be “integral to the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility”. Only TK that satisfies the protection criteria will be granted protection.

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## ***Section 5 – Formalities Relating to Protection of Traditional Knowledge***

Formalities of protection are official requirements that TK holders must fulfil in order to acquire and maintain their IP rights in a given jurisdiction. These may include, for example, registration, notification or the payment of fees. Under the Protocol, the protection of TK is not subject to any formality, therefore protection arises automatically. The policy rationale for this is that imposing formalities can be cumbersome and create barriers to access to protection. However, for purposes of transparency, evidence and preservation of TK, national authorities or the ARIPO Office may maintain registers or other records of the knowledge. Such registers may be associated with specific forms of protection and should not compromise the status of any secret TK. On the other hand, where two or more communities in the same or different countries share the same TK, the ARIPO Office and the relevant national authority shall register ownership of that TK.

## ***Section 6 – Beneficiaries of Protection of Traditional Knowledge***

This section establishes who should benefit from the protection of TK. It provides that the beneficiaries of protection shall be the holders of the TK, that is, the local and traditional communities, or recognized individuals within these communities who create, preserve and transmit the knowledge in a traditional and intergenerational context.

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## ***Section 7 – Rights Conferred to Holders of Traditional Knowledge***

This section describes the scope of protection of TK under the Protocol. The beneficiaries of protection are conferred the exclusive rights to authorize as well as to prevent the exploitation of their TK without their PIC. In addition, they are granted the right to institute legal proceedings against the exploitation of their TK without permission. In this context, “exploitation” includes, for example, the manufacturing, importing or offering for sale of a product, or the use of a process beyond its traditional context.

## ***Section 8 – Assignment and Licensing***

This section grants individual owners the rights to assign and licence TK. However, TK that belongs to a local or traditional community may not be assigned. Only written assignments or licences will be binding, and these documents must be approved by the national authority. The ARIPO Office will keep a record of all licences and assignments granted under this section.

## ***Section 9 – Equitable Benefit-Sharing***

Benefit-sharing is the sharing between TK holders and third party users of profits derived from the commercial or industrial use of TK. The benefits can either be monetary or non-monetary, such as contributions to community development. Benefit-sharing can provide incentives for collaboration and establish partnerships between local or traditional communities and third parties. Under this section, the pro-

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tection of TK holders includes the fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge as mutually agreed between the parties. However, if there is no mutual agreement, the national authority shall mediate and assist parties to reach an agreement which should be proportionate to the objectives of protection, as well as maintain an equitable balance of interests.

### ***Section 10 – Recognition of Knowledge Holders***

This section entitles TK holders to a right of recognition, or right to be acknowledged for their TK, similar to a moral right under copyright law. Accordingly, any person using TK beyond its traditional context should make a reasonable attempt to identify the source and origin of the TK, and use it in a respectful manner.

### ***Section 11 – Exceptions and Limitations Applicable to Protection of Traditional Knowledge***

The IP system allows certain exceptions and limitations on IP rights to ensure appropriate balance between the interests of right holders and those of third party users of protected works. Similarly, rights in TK may be limited so as to avoid unreasonable prejudice to the interests of society, to the customary transmission of TK systems, and to other legitimate interests. Exceptions and limitations under section 11 ensure that the protection of TK does not adversely affect the continued availability of TK to the TK holders themselves by interfering with their customary practices of using, exchanging, transmitting and practicing their TK.

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## ***Section 12 – Compulsory Licence***

The purpose of this section is to safeguard the interests of legitimate third parties and the general public. A Contracting State may allow a legitimate third party to use TK without the consent of the right holders if the TK is not sufficiently exploited by the right holders and the interests of public security or health are at risk. In addition, access to TK should not create burdens for legitimate users of TK such as unnecessary administrative procedures. Where there is no agreement between the parties, a competent court will award appropriate compensation for the compulsory licence.

## ***Section 13 – Duration of Protection of Traditional Knowledge***

This section deals with the term of protection of TK. Generally speaking, the IP system creates time limited property rights in a wide and diverse range of subject matter, such as artistic works, performances, designs or inventions. When the term of protection expires, the subject matter of these rights falls into the public domain and is free for anyone to use. However, some local and traditional communities would like to see their rights protected indefinitely, and in this respect, most IP systems do not meet their needs.<sup>21</sup> Under the Protocol the protection of TK should last as long as the TK fulfils the criteria of protection, that is, as long as it is distinctively associated with a local or traditional community, preserved and transmitted in a traditional and inter-generational context. In a way, this section establishes the notion of indefinite duration but not necessarily that of perpetual duration. However, where TK exclusively belongs to

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<sup>21</sup> Trademarks or certification marks can provide protection that is unlimited in time, provided that the registration of the mark is renewed and continues to fulfill the requirements for protection.

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an individual, protection will last for only 25 years following the exploitation of knowledge beyond its traditional context.

### ***Section 14 – Administration and Enforcement of Protection of Traditional Knowledge***

Acting on behalf of the Contracting States, the ARIPO Office and the national authorities shall be entrusted with the tasks of awareness-raising, education, guidance, registration, monitoring, dispute resolution, enforcement and other activities relating to the protection of TK. In addition, national authorities shall advise and assist TK holders to defend their rights and, if necessary, institute civil or criminal proceedings on their behalf. The ARIPO Office shall have the responsibility to promote, educate, guide, monitor and manage dispute resolutions and other activities relating to the protection of trans-boundary TK.

### ***Section 15 – Access to Traditional Knowledge Associated with Genetic Resources***

This section distinguishes between the TK associated with GRs, and the GRs themselves. TK associated with GRs refers to the knowledge acquired from TK communities indicating that certain GRs possess active ingredients, qualities or properties that can be used for medicinal, agricultural, cosmetic or horticultural purposes. While it may be possible, under the Protocol, for third parties to get an authorisation to access TK associated with GRs, this does not imply an authorization to use the actual GRs. The scope of the Protocol only extends to the protection of TK and EoF. It does not address IP issues in relation to the access and use of GRs.<sup>22</sup>

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<sup>22</sup> ARIPO has a separate draft policy framework dealing with access and benefit-sharing arising from the use of genetic resources, which is complementary to the Protocol.

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## **PART III: PROTECTION OF EXPRESSIONS OF FOLKLORE**

### ***Section 16 – Protection Criteria for Expressions of Folklore***

This section establishes the characteristics that EoF must have in order to be protectable under the Protocol. In particular, EoF must be the products of creative and cumulative intellectual activity, they must be characteristic of a community's cultural identity and traditional heritage and, finally, they must be maintained, used or developed by such a community in accordance with the customary laws and practices of that community. Only EoF that satisfy the protection criteria will be awarded protection.

### ***Section 17 – Formalities Relating to Protection of Expressions of Folklore***

Formalities of protection are official requirements that the holders of EoF must fulfil in order to acquire and maintain their IP rights in a given jurisdiction. These may include, for example, registration, notification or the payment of fees. Under the Protocol, the protection of EoF is not subject to any formality. Therefore, protection arises automatically. The policy rationale for this is that imposing formalities can be cumbersome and create barriers to access to protection. However, for the purpose of evidence, certain categories of EoF, such as those with special cultural or spiritual value, or those that are sacred, may be notified to the appropriate authority. Such notification would merely have a declaratory effect and would not in itself constitute rights. In addition, where two or more communities in the same or different countries share the same EoF, the ARIPO Office and the relevant national authority shall be responsible for registering ownership in that EoF.

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### ***Section 18 – Beneficiaries of Protection of Expressions of Folklore***

This section establishes who should benefit from the protection of EoF. It provides that the beneficiaries of protection shall be the local and traditional communities to whom the custody and protection of the EoF are entrusted in accordance with customary law and practice, and who maintain and use the EoF as a characteristic of their traditional cultural heritage.

### ***Section 19 – Protection of Expressions of Folklore Against Unlawful Acts***

This section describes the scope of protection of EoF under the Protocol. It provides that EoF shall be protected from misappropriation, misuse and unlawful exploitation. The Protocol distinguishes between EoF of particular cultural or spiritual value or significance to a community, secret EoF and other EoF. Generally speaking, Contracting States shall provide adequate and effective legal and practical measures to ensure acknowledgement of the source community; prevent distortions, mutilations, modifications or derogatory treatment of EoF; prevent false, confusing or misleading indications or indications which would suggest an endorsement or linkage with a community, and ensure equitable remuneration or benefit-sharing, where the third party use or exploitation is for gainful intent. In relation to EoF of cultural or spiritual value, Contracting States are also required to provide legal and practical measures to prevent certain acts, such as the reproduction, publication, adaptation, or public performance of the EoF from taking place without the community's PIC. Finally, secret EoF shall also be protected against unauthorized disclosure, subsequent use, and against the acquisition and exercise of IP.

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## ***Section 20 – Exceptions and Limitations Applicable to Protection of Expressions of Folklore***

The IP system allows certain exceptions and limitations on IP rights to ensure an appropriate balance between the interests of right holders and those of third party users of protected works. Similarly, rights in EoF may be limited so as to avoid unreasonable prejudice to the interests of society, to the customary transmission of EoF, and to other legitimate interests. Section 20 provides a number of exceptions and limitations to measures for the protection of EoF. First, it ensures that the protection of EoF shall not restrict or hinder normal use, development, exchange, dissemination and transmission of EoF within the traditional or customary context. Second, it provides that measures for the protection of EoF only extend to scenarios where use of EoF is taking place beyond the traditional or customary context. Third, it allows certain exceptions for non-commercial uses, such as teaching, research, private use, reporting current events, and reproduction for archiving or inventory purposes in order to protect the cultural heritage. Finally, it provides that special provisions may be made by a national authority regarding the use of EoF by its citizens. The use should be in accordance with fair practice, acknowledge the source and origin of the EoF, and not be offensive to the relevant community. It is important to note that although non-commercial uses of EoF do not incur an obligation for compensation, suitable benefit-sharing from such uses should be encouraged, including access to research outcomes or the involvement of the source community in research and educational activities.

## ***Section 21 – Duration of Protection of Expressions of Folklore***

This section deals with the term of protection of EoF. Generally speaking, the IP system creates time limited property rights in a wide and diverse range of subject matter, such

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as artistic works, performances, designs or inventions. When the term of protection expires, the subject matter of these rights falls into the public domain and is free for anyone to use. However, some local and traditional communities would like to see their rights protected indefinitely, systems do not meet their needs.<sup>23</sup> According to the Protocol, the protection of EoF will last as long as the EoF fulfil the criteria of protection, in particular, as long as they are the products of creative and cumulative intellectual activity, they are characteristic of a community's cultural identity and traditional heritage and are maintained, used or developed by such a community in accordance with the customary laws and practices of that community.

## ***Section 22 – Management of Rights in Expressions of Folklore***

The section aims to ensure the effective management and protection of EoF. Acting on behalf of the Contracting States, the ARIPO Office and the national authorities shall be entrusted with the tasks of awareness-raising, education, guidance, monitoring, dispute resolution, and other activities relating to the protection of EoF. In addition, national authorities, acting on behalf, and in the interest, of communities shall be competent to grant authorizations to exploit EoF. When carrying out these tasks, the national authority shall consult with the relevant communities. The benefits from authorized uses of EoF must be distributed fairly and any profits, whether monetary or not, should be transferred to the community. Any disputes as to which communities are concerned shall be resolved in accordance with its customary law and protocol. Finally, legislation or administrative measures should provide guidance on matters such as procedures for applications for authorization, fees and dispute resolution. ARIPO shall have the

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<sup>23</sup> Trademarks or certification marks can provide protection that is unlimited in time, provided that the registration of the mark is renewed and continues to fulfil the requirements for protection.

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responsibility to promote, educate, guide, monitor and manage dispute resolutions and other activities relating to the protection of trans-boundary EoF. It is important that the protection and management of EoF are effective, appropriate and accessible, taking into account the cultural, social, economic and political context of local and traditional communities.

## **PART IV: GENERAL PROVISIONS**

### ***Section 23 – Sanctions, Remedies and Enforcement***

The aim of this section is to ensure that Contracting States provide accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies where there are breaches of provisions relating to the protection of TK and EoF. National authorities shall advise and assist the holders of TK and EoF to defend and enforce their rights and, if necessary, institute civil or criminal proceedings on their behalf.

### ***Section 24 – Regional Protection***

There should be no discrimination between eligible foreign and national holders of TK and EoF. In this regard, the national authorities and ARIPO shall establish measures to assist foreign holders of TK and EoF with acquisition, management and enforcement. The ARIPO Office may have jurisdiction to resolve cases of concurrent claims from communities in different countries, by applying customary law together with different mechanisms deemed necessary to settle the cases. Measures and procedures developed by national authorities and ARIPO should provide safeguards

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for foreign holders of TK and EoF.

### ***Section 25 – Transitional Measures***

According to the transitional measures, the exploitation and dissemination of TK that took place prior to the entry into force of the Protocol may continue as long as they comply with the provisions relating to equitable benefit-sharing (section 9) and recognition of source (section 10). Likewise, the continued use of EoF shall comply with the protection of EoF against unlawful acts (section 19). These measures should take place within twelve months of the entry into force of the Protocol and are subject to equitable treatment of the rights and interests acquired by third parties through prior use in good faith.

### ***Section 26 – Regulations***

The ARIPO Administrative Council shall be entrusted with drafting Regulations for the implementation of the Protocol. These shall stipulate, for example, what the application procedures to authorize exploitation of TK and EoF are, the fees to be charged by ARIPO, and how those fees should be distributed among Contracting States.

### ***Section 27 – Entry into Force***

The section establishes the formal requirements for the entry into force of the Protocol. Any Member State of ARIPO, the AU or the UNECA can become party to the Protocol. Contracting States should deposit an instrument of ratification (for signatories) or accession (for non-

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signatories) with the Government of Zimbabwe, where ARIPO is based, which may include Zimbabwean Embassies within their territories. The Protocol shall enter into force three months after ratification or accession by six states. The ratification or accession of the Protocol by any state implies acceptance of the Agreement on the Creation of ARIPO, i.e. the Lusaka Agreement. This means that any state that is not already a Member of ARIPO acknowledges and accepts the principles and objectives enshrined in the Agreement.

### ***Section 28 – Reservations***

Reservations may not be made to the Protocol. Consequently, Contracting States shall be bound by all the provisions of the Protocol.

### ***Section 29 – Signature of the Protocol***

Each Contracting State must deposit a single signed copy of the Protocol with the Government of Zimbabwe, which will distribute certified copies to all Contracting States.

### ***Section 30 – Amendment of the Protocol***

Amendments to the Protocol shall be possible at the request of a Contracting State or the Director-General of ARIPO during the session of the ARIPO Administrative Council. Amendments to any provision will be adopted following a two-thirds majority vote of all Contracting States.

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### ***Section 31 – Denunciation of the Protocol***

Denunciation of the Protocol is possible by any Contracting State by notification addressed to the Government of the Republic of Zimbabwe. The denunciation shall take effect six months after the Government of Zimbabwe has acknowledged receipt of the notification.

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## REFERENCES

1. ARIPO Secretariat, *Colloquium for the Judiciary on Intellectual Property Rights, Protection of Traditional Knowledge, Expressions of Folklore and Access to Genetic Resources*, Swakopmund, Namibia (April 13 to 15 2008).
2. G. Dutfield, *Protecting Traditional Knowledge: Pathways to the Future*, (ICTSD Geneva, June 2006).
3. P. Kuruk, 'African customary law and the protection of folklore', 36(2) *Copyright Bulletin* (2002).
4. J. Mugabe, 'Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse', paper presented in a WIPO panel discussion to commemorate the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights (Geneva, November 1998).
5. D. Posey and G. Dutfield, *Beyond Intellectual Property* (International Development Research Centre, Ottawa, 1996).
6. S.M. Subramanian and B. Pisupati (eds.), *Traditional Knowledge in Policy and Practice: Approaches to Development and Human Well-Being* (United Nations University Press, Tokyo, 2010).
7. S. Von Lewinski (ed.), *Indigenous Heritage and*

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*Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, 2<sup>nd</sup> edition (Kluwer Law International, The Hague, 2008).

8. WIPO Secretariat, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva (2001).
9. WIPO Secretariat, *The Protection of Traditional Cultural Expressions: Draft Articles* (Document WIPO/GRTKF/IC/22/4).
10. WIPO Secretariat, *The Protection of Traditional Knowledge: Draft Articles* (Document WIPO/GRTKF/IC/21/4).
11. WIPO Secretariat, *Intellectual Property and Traditional Cultural Expressions/Folklore*, Booklet no.1.
12. WIPO Secretariat, *Intellectual Property and Traditional Knowledge*, Booklet no.2.
13. WIPO Secretariat, *Traditional Knowledge and Intellectual Property*, Background Brief no. 1.



