

KEI Briefing Note 2026-2: Including language on traditional knowledge in the PABS Annex introduces unrelated and complex issues that lack consensus or clear implementation standards.

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There were several references to traditional knowledge (TK) and traditional medicine (TM) in the onscreen versions of the PABS Annex during current and past sessions of the IGWG. Negotiators should eliminate references to TK or TM in the PABS Annex.

There are references to TK in the main Pandemic Agreement text, which is appropriate, given that the overall agreement addresses a multitude of issues, including those regarding the development and use of products or services for the diagnosis, treatment and prevention of pandemic illnesses, areas where TK may play a role. The Pathogen Access and Benefit Sharing (PABS) system, on the other hand, has a narrower purpose: to provide rapid access and benefit sharing to “PABS Materials and Sequence Information.”

The definition of PABS Materials is still in brackets, but generally describes biological materials from pathogens and sequence data, collected and shared with parties seeking to develop vaccines, therapeutics, or diagnostics. PABS is about genetic resources and their digital representation.

TK, including traditional medical knowledge (TMK), can play a role in the diagnosis, treatment and prevention of pandemics, and there are numerous existing and planned databases dealing with such knowledge. Among the challenges in developing and managing databases on TK are those related to consent. In both international and national legal systems, requirements for obtaining consent for the use of TK are different from those for the use of genetic resources.

There is considerable variation in the state practice of assigning rights in TK and the consent required to access and use such TK, as well as variation in the limitations and exceptions to these rights and obligations.

The World Intellectual Property Organization (WIPO) has held 52 negotiating sessions of its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), since 2001. The most recent published draft of the negotiating text on rights associated with TK is 34 pages long and contains 518 brackets, reflecting the absence of consensus. ([WIPO/GRTKF/IC/52/4](#))

Among other things, the various drafts make distinctions between **secret** TK, **sacred** TK, **narrowly diffused** TK, and **widely diffused** TK. There is no consensus on how to define Indigenous communities or peoples, or local communities. Nor is there consensus on the scope and objectives of rights, or the applicable exceptions and limitations to those rights. Article 5BIS of WIPO/GRTKF/IC/52/4, titled “Database Protection,” is itself 808 words long and has 72 brackets.

National legal standards governing consent, including what constitutes free, prior, and informed consent, remain controversial, and state practices are far from uniform.

It is difficult to overstate the diversity of national approaches to the protection of TK. As one illustration, the treatment of exceptions and limitations for uses such as research, use by traditional practitioners, or for public health purposes, varies considerably across regimes. For example, there are significant differences between the Swakopmund Protocol, the Andean Community Decision 39, Peru's Law 27811, the Philippines' Indigenous Peoples' Rights Act (IPRA), and India's Biological Diversity Act (2002, as amended in 2023), to mention only a few examples.

The Swakopmund Protocol provision on compulsory licenses for TK provides a useful illustration of the range of issues that are implicated when addressing consent and/or the limits to rights in TK.

SWAKOPMUND PROTOCOL ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF FOLKLORE

https://www.aripo.org/storage/resources-protocols/1674640255_phpJRYyDj.pdf

Section 12

Compulsory licence

12.1. Where protected traditional knowledge is not being sufficiently exploited by the rights holder, or where the holder of rights in traditional knowledge refuses to grant licences subject to reasonable commercial terms and conditions, a Contracting State may, in the interests of public security or public health, grant a compulsory licence in order to fulfil national needs.

12.2. In the absence of an agreement between the parties, an appropriate amount of compensation for the compulsory licence shall be fixed by a court of competent jurisdiction.

Conclusion

There is no obvious rationale for including TK language in the PABS Annex. Depending on the formulation, such language risks creating uncertainty over the nature, purpose and operation of the PABS system. Such language may also present obstacles for national ratifications of the Pandemic Agreement and create additional motivations for actors to route around the PABS system altogether in order to avoid the uncertainty and procedural delays that are associated with consent requirements for the use of TK.

ANNEX: Article 5BIS in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Draft Articles on the Protection of Traditional Knowledge: WIPO/GRTKF/IC/52/4

[ARTICLE 5BIS

[DATABASE], [COMPLEMENTARY] [AND] [DEFENSIVE] PROTECTION

Database Protection

[Recognizing the importance of cooperation and consultation] Member States should endeavor to cooperate and consult with Indigenous [Peoples] and Local Communities [in determining access] [to traditional knowledge], [Member States should endeavor to], subject to and consistent with national [and customary] law, [facilitate and encourage the development of] [the following] [national traditional knowledge databases to which beneficiaries may voluntarily contribute their traditional knowledge] as follows:

5BIS.1 Publicly accessible national [traditional knowledge] databases publicly available traditional knowledge for the purpose of transparency, certainty, conservation, and transboundary cooperation, and to facilitate and encourage, as appropriate, the creation, exchange and dissemination of, and access to traditional knowledge.

[5BIS.2 National [traditional knowledge] databases of publicly available traditional knowledge accessible only by intellectual property offices for the purpose of prevention of the erroneous grant of intellectual property rights. Intellectual property offices should seek to ensure that such information is maintained in confidence, except where the information is cited during the examination of an application for intellectual property protection.]

5BIS.3 Non-public national traditional knowledge databases for the purpose of [codify] [codifying] and conserving traditional knowledge within Indigenous and local communities. Non-public national traditional knowledge databases should only be accessible by beneficiaries in accordance with their respective [customary] laws] and established practices that govern the access or use of such traditional knowledge.

[Complementary][Defensive] Protection

5BIS.4 [Member States]/[Contracting Parties] should [endeavour to], subject to and consistent with national and customary law:

- (a) facilitate/encourage the development of [publicly accessible] national traditional knowledge databases for the defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation;
- (b) [facilitate/encourage, as appropriate, the creation, exchange and dissemination of, and access to, [publicly accessible] databases of genetic resources and traditional knowledge associated with genetic resources;]

- (c) [provide opposition measures that will allow third parties to dispute the validity of a patent [by submitting prior art];]
- (d) encourage the development and use of voluntary codes of conduct;
- (e) [discourage information lawfully within the beneficiaries' control from being disclosed, acquired by or used by others without the beneficiaries' [consent], in a manner contrary to fair commercial practices, so long as it is [secret], that reasonable steps have been taken to prevent unauthorized disclosure, and has value;]
- (f) [consider the establishment of [publicly accessible] databases of traditional knowledge that are accessible to patent offices to avoid the erroneous grant of patents compile and maintain such databases in accordance with national law;
 - (i) there should be minimum standards to harmonize the structure and content of such databases;
 - (ii) the content of the databases should be:
 - a. languages that can be understood by patent examiners;
 - b. written and oral information regarding traditional knowledge;
 - c. relevant written and oral prior art related to traditional knowledge.]
- (g) [develop appropriate and adequate guidelines for the purpose of conducting search and examination of patent applications relating to traditional knowledge by patent offices;]

5BIS.5 [In order to document how and where traditional knowledge is practiced, and to preserve and maintain such knowledge, efforts [should]/[shall] be made by national authorities to codify the oral information related to traditional knowledge and to develop [publicly accessible] databases of traditional knowledge.]] in consultation with Indigenous [Peoples] and Local Communities that hold this information.

5BIS.6 [Member States]/[Contracting Parties] [should]/[shall] consider cooperating in the creation of such databases, especially where traditional knowledge is not uniquely held within the boundaries of a [Member States]/[Contracting Parties]. [If [protected] traditional knowledge [pursuant] as defined in to Section 2 is included in a database, the [protected] traditional knowledge should only be made available to others with the free, prior and informed consent or approval and involvement of the traditional knowledge holder.]

5BIS.7 Efforts [should]/[shall] also be made to facilitate access to such databases by intellectual property offices, so that the appropriate decision can be made. To facilitate such access, [Member States]/[Contracting Parties] [should]/[shall] consider efficiencies that can be gained from international cooperation. The information made available to intellectual property offices [should]/[shall] only include information that can be used to refuse a grant of [cooperation] patent, and thus [should]/[shall] not include secret traditional knowledge.

5BIS.8 Efforts [should]/[shall] be made by national authorities to considering codify the publicly accessible information related to traditional knowledge for the purpose of enhancing the development of [publicly accessible] databases of traditional knowledge, so as to preserve and maintain such knowledge.

5BIS.9 Efforts [should]/[shall] also be made to facilitate access to publicly accessible information including information made available in [publicly accessible] databases relating to traditional knowledge by intellectual property offices.

5BIS.10 [Intellectual property offices [should]/[shall] ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application.]]