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## **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**Thirty-Fourth Session  
Geneva, June 12 to 16, 2017**

**DECISIONS OF THE THIRTY-FOURTH SESSION OF THE COMMITTEE**

*Adopted by the Committee*

DECISION ON AGENDA ITEM 2:

ADOPTION OF THE AGENDA

The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/34/1 Prov. 2 for adoption and it was adopted.

DECISION ON AGENDA ITEM 3:

ADOPTION OF THE REPORT OF THE THIRTY-THIRD SESSION

The Chair submitted the draft report of the Thirty-Third Session of the Committee (WIPO/GRTKF/IC/33/7 Prov. 2) for adoption and it was adopted.

DECISION ON AGENDA ITEM 4:

ACCREDITATION OF CERTAIN ORGANIZATIONS

The Committee unanimously approved the accreditation of the five organizations listed in the Annex to document WIPO/GRTKF/IC/34/2 as *ad hoc* observers, namely: Federación Indígena Empresarial y Comunidades Locales de México, Asociación Civil (CIELO); Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT); DAGBAKA Action pour un Monde Equitable (DAPME) NGO; Promotion des Yaelima de Dekese (PROYADE); and Social Economic and Governance Promotion Centre (SEGP).

DECISION ON AGENDA ITEM 5:

REPORTING ON THE *SEMINAR ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS* (JUNE 8 AND 9, 2017)

The Committee took note of the oral reports from the rapporteurs: Mr. Ahmed Al-Shehhi, Specialist of Organizations and Cultural Relations, Ministry of Heritage and Culture, Muscat, Oman; Dr. Sumit Seth, First Secretary, Permanent Mission of India to the United Nations, Geneva, Switzerland; Ms. Bernadette Butler, Minister-Counsellor, Permanent Mission of the Commonwealth of the Bahamas to the United Nations Office and other international organizations, Geneva, Switzerland; and Ms. Liene Grike, Adviser, Economic and Intellectual Property Affairs, Permanent Mission of the Republic of Latvia to the United Nations Office and other international organizations, Geneva, Switzerland.

The Committee also took note of document WIPO/GRTKF/IC/34/INF/9.

DECISION ON AGENDA ITEM 6:

PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

The Committee took note of documents WIPO/GRTKF/IC/34/3, WIPO/GRTKF/IC/34/INF/4 and WIPO/GRTKF/IC/34/INF/6.

The Committee strongly encouraged and called upon members of the Committee and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.

The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Hamadi Ag Mohamed Abba, Representative, ADJMOR, Mali; Mr. Abdoul Aziz Dieng, Technical Advisor, Ministry of Culture and Communication, Senegal; Mr. Parviz Emomov, Second Secretary, Permanent Mission of Tajikistan, Geneva; Ms. Aideen Fitzgerald, Policy Officer, International Policy and Cooperation

Section, IP Australia, Australia; Ms. June Lorenzo, Representative, Indigenous World Association (IWA), United States of America; Ms. Nusta Maldonado, Third Secretary, Permanent Mission of Ecuador, Geneva; Mr. Kamal Kumar Rai, Representative, Himalayan Folklore and Biodiversity Study Program, IPs Society for Wetland Biodiversity Conservation, Nepal; and Ms. Ofa Veiqaravi Solimailagi, Senior Legal Officer, Office of the Attorney-General, Suva, Fiji.

The Chair of the Committee nominated Ambassador Robert Matheus Michael Tene, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.

#### DECISION ON AGENDA ITEM 7:

##### TRADITIONAL CULTURAL EXPRESSIONS

The Committee developed, on the basis of document WIPO/GRTKF/IC/34/6, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that this text, as at the close of this agenda item on June 15, 2017, be considered by the Committee under Agenda Item 8 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee's mandate for 2016-2017 and the work program for 2017, as contained in document WO/GA/47/19.

The Committee also took note of documents WIPO/GRTKF/IC/34/7, WIPO/GRTKF/IC/34/12, WIPO/GRTKF/IC/34/INF/7 and WIPO/GRTKF/IC/34/INF/8.

#### DECISION ON AGENDA ITEM 8:

##### TAKING STOCK OF PROGRESS AND MAKING A RECOMMENDATION TO THE GENERAL ASSEMBLY

The Committee noted that throughout the 2016-2017 biennium, a draft text was prepared on each subject matter, narrowing the gaps on core issues. Noting the progress made, the Committee considered that more work needs to be done.

Bearing in mind the Development Agenda recommendations and affirming the importance of the Committee, the Committee recommended that the WIPO General Assembly decide that the Committee should continue its work during the 2018-2019 biennium and that the Assembly decide on a mandate and a work program.

The Committee submitted herewith to the WIPO General Assembly the results of its work on genetic resources, traditional knowledge and traditional cultural expressions:

- Consolidated Document Relating to Intellectual Property and Genetic Resources (document WIPO/GRTKF/IC/34/4);
- The Protection of Traditional Knowledge: Draft Articles (document WIPO/GRTKF/IC/34/5);
- The Protection of Traditional Cultural Expressions: Draft Articles (document WIPO/GRTKF/IC/34/8).

The Committee decided that this decision is without prejudice to the elements of the mandate to be approved by the General Assembly.

DECISION ON AGENDA ITEM 9:

CONTRIBUTION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) TO THE IMPLEMENTATION OF THE RESPECTIVE DEVELOPMENT AGENDA RECOMMENDATIONS

The Committee held a discussion on this item. The Committee decided that all statements made on this item would be recorded in the report of the Committee and that they would also be transmitted to the WIPO General Assembly taking place from October 2 to 11, 2017, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.

DECISION ON AGENDA ITEM 10:

ANY OTHER BUSINESS

There was one statement under this item, which was noted.

DECISION ON AGENDA ITEM 11:

CLOSING OF THE SESSION

The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7, 8 9 and 10 on June 16, 2017. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by August 31, 2017. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the next session of the Committee.

[Annexes follow]

**Second Revision of the Consolidated Document Relating to  
Intellectual Property and Genetic Resources**

**(as at the close of IGC 30 on June 3, 2016)**

## LIST OF TERMS

### **[Traditional Knowledge Associated with Genetic Resources**

#### Option 1

“Traditional knowledge associated with genetic resources” means knowledge which is dynamic and evolving, generated in a traditional context, collectively preserved and transmitted from generation to generation including but is not limited to know-how, skills, innovations, practices and learning, [that subsist in] [that are associated with] genetic resources.]

#### Option 2

“Traditional knowledge associated with genetic resources” means substantive knowledge of the properties and uses of genetic resources [and their derivatives] held by [rightful holders, including] indigenous [people[s]] and local communities [and which directly leads to a claimed [invention] [intellectual property]] [and where, but for the traditional knowledge, the invention would not have been made].]

### **[Biotechnology**

“Biotechnology” [as defined in Article 2 of the Convention on Biological Diversity] means any technological application that uses biological systems, living organisms [or derivatives thereof], to make or modify products or processes for specific use.]

### **[Country of Origin**

“Country of origin” is the [first] country which possesses genetic resources in in-situ conditions.]

### **[[Country Providing] [Providing Country]**

“Country providing/Providing country” means, [in accordance with Article 5 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity], a [providing country] [country providing] that is the country of origin [or that has acquired the genetic resources and/or that has accessed the traditional knowledge in accordance with the [Convention on Biological Diversity].]]

### **[Country Providing Genetic Resources**

“Country providing genetic resources” is the country supplying genetic resources collected from in-situ sources, including populations of both wild and domesticated species, or taken from ex-situ sources, which may or may not have originated in that country.]

#### ALT

[“Country providing genetic resources” is the country that possesses the genetic resource and/or traditional knowledge in in situ or ex situ conditions and that provides the genetic resource and/or traditional knowledge.]

### **[Derivative]**

“Derivative” means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.]

### **[[Invention] Directly Based On**

“[[Invention] Directly based on” means that the [invention] [must] make [immediate] use of the genetic resource, and depend on the specific properties of the resource of which the inventor [must] have had [physical] access.]

### **Ex-Situ Conservation**

“Ex-situ conservation” means the conservation of components of biological diversity outside their natural habitats.

### **Genetic Material**

“Genetic material” means any material of plant, animal, microbial or other origin containing functional units of heredity.

### **Genetic Resources**

"Genetic resources" are genetic material of actual or potential value.

### **In-Situ Conditions**

“In-situ conditions” means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties [Article 2, CBD].

### **[Member State**

“Member State” refers to a Member State of the World Intellectual Property Organization.]

### **[Misappropriation**

Option 1

“Misappropriation” is the [acquisition] [utilization] of genetic resources, [their derivatives] [and] [or] [traditional knowledge associated with genetic resources] without the [free] [prior informed] consent of [those who are authorized to give [such] consent] [competent authority] to such [acquisition] [utilization], [in accordance with national legislation] [of the country of origin or providing country].]

## Option 2

["Misappropriation" is the use of genetic resources, [their derivatives] and/or [traditional knowledge associated with genetic resources] of another where the genetic resources or traditional knowledge has been acquired by the user from the holder through improper means or a breach of confidence which results in a violation of national law in a provider country. Use of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] that has been acquired by lawful means, such as reading publications, purchase, independent discovery, reverse engineering and inadvertent disclosure resulting from the holders of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] failure to take reasonable protective measures, is not misappropriation.]

**[Intellectual Property Office] [Patent Office]**

["Intellectual property office"] ["Patent office"] means the authority of a Member State entrusted with the granting of [intellectual property rights] [patents].

**[[Physical] Access**

["Physical]/[Direct] access" to the genetic resource is its possession or at least contact [which is sufficient enough to identify the properties of the genetic resource relevant for the [invention] [intellectual property]].]

**[[Protected] Genetic Resources**

["Protected] genetic resources" means, genetic resources that are protected either pursuant to an intellectual property right or other legal right. Once intellectual property rights in a genetic resource expire, the genetic resource should be in the public domain and not treated as a protected genetic resource.<sup>1</sup>

**[Source**

## [Option 1

"Source" refers to any source from which the applicant has acquired the genetic resource other than the country of origin, such as a resource holder, research centre, [gene bank] [Budapest depository] or botanical garden.]

## [Option 2

"Source" should be understood in its broadest sense possible:

- (i) Primary sources, including in particular [Contracting Parties] [Countries] providing genetic resources, the Multilateral System of ITPGRFA, [patent owners, universities, farmers, and plant breeders,] indigenous and local communities; and
- (ii) Secondary sources, including in particular ex-situ collections and [scientific literature],.]

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<sup>1</sup> Several Member States expressed a difficulty in understanding the meaning of this definition. While it is retained in the list of terms, it is requested that the proponents provide greater clarity.

**[Source of Traditional Knowledge with Associated Genetic Resources**

“Source of Traditional Knowledge Associated with Genetic Resources” means any source from which the applicant has acquired the traditional knowledge associated with genetic resources, including indigenous and local communities, scientific literature, publicly accessible databases, and patent applications, and patent publications.<sup>2]</sup>

**[Unauthorized Use**

“Unauthorized use” is the acquisition of genetic resources, [traditional knowledge associated with genetic resources] without the consent of the competent authority in accordance with national legislation of the providing country.]

**[Utilization**

“Utilization” of Genetic Resources means to conduct research and development, [conservation, collection, characterization, among others,] [including commercialization] on the genetic and/or biochemical composition of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] [including through the application of biotechnology] [as defined in Article 2 of the Convention on Biological Diversity].]

ALT

[“Utilization” of genetic resources means to conduct research and development [including commercialization] on the genetic and/or biochemical composition of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] [including through the application of biotechnology] [as defined in Article 2 of the Convention on Biological Diversity] [and to make a new product, or a new method of use or manufacturing of a product.]]]

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<sup>2</sup> This phrase does not appear verbatim in the document, but was introduced contemporaneously with the global deletion of “associated traditional knowledge” from the text. Upon reflection, it was felt that the Member State which introduced the phrase should have the opportunity to clarify its continuing relevance to the text.

**[PREAMBLE**

[Ensure [encourage] respect for [sovereign rights] [the rights] of [rightful holders, including] indigenous [people[s]] and local communities [as well as [people[s]] partially or entirely under occupation] over their genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources], including the principle of [prior informed consent and mutually agreed terms] and total and effective participation in accordance with international [agreements and] declarations [, in particular the UN Declaration on the Rights of Indigenous Peoples].]

[Contribute to the prevention of misappropriation of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources].]

[Minimize the granting of erroneous [IP] [patent] rights.]

[Reaffirming the important economic, scientific, cultural, and commercial value of genetic resources and [traditional knowledge associated with genetic resources].]

[Acknowledging the important contribution of the patent system to scientific research, scientific development, innovation and economic development.]

[Stressing the need for members to ensure the correct grant of patents for novel and non-obvious inventions related to genetic resources and [traditional knowledge associated with genetic resources].]

Encourage respect for indigenous [people[s]] and local communities.

[The [intellectual property] [patent] system shall/should provide certainty of rights for legitimate users and providers of genetic resources, [their derivatives] and/or [traditional knowledge associated with genetic resources].]

[Recognize the role the [intellectual property] [patent] system plays in promoting innovation, [transfer and dissemination of technology] to the mutual advantage of stakeholders, providers, holders and users of genetic resources, [their derivatives] and/or [traditional knowledge associated with genetic resources].]

[Promote [transparency and] dissemination of information.]

[A global and compulsory system creates a level playing field for industry and the commercial exploitation of [intellectual property] [patents], and also facilitates the possibilities [under Article 15(7) of the CBD] for the sharing of the benefits arising from the use of genetic resources.]

[Foster [patent] [industrial property] protection and the development of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] and encourage international research leading to innovation.]

[The disclosure of the source would increase mutual trust among the various stakeholders involved in access and benefit sharing. All of these stakeholders may be providers and/or users of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources]. Accordingly, disclosing the source would build mutual trust in the North – South – relationship. Moreover, it would strengthen the mutual supportiveness between the access and benefit sharing system and the [intellectual property] [patent] system.]

[[Ensure] [recommend] that no [patents] [intellectual property] on life forms, including human beings, are granted.]

[Recognize that those accessing genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] in a country shall/should, where required, comply with that country's national law providing protection for the genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources].]

[[IP][Patent] offices shall/should have a mandatory requirement for disclosure, as elaborated in this international legal instrument, when patenting of genetic resources would cause harm to the interests of indigenous [people[s]] and local communities.]

[Reaffirm, in accordance with the Convention *on* Biological Diversity, the sovereign rights of States over their [natural] [biological] resources, and that the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.]]

ALT

[Reaffirm, in accordance with the Convention *on* Biological Diversity, the sovereign rights of States over [their] [natural] [biological] [genetic] resources [within their jurisdiction other than those associated with human beings or those associated with intellectual property rights], and that the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.]]

## **[I. GENERAL PROVISIONS]**

### **[ARTICLE 1 OBJECTIVE[S]]**

1 [The objectives of this instrument are to [enhance the [efficacy] and [transparency] of the [IP] [patent] system; and facilitate mutual supportiveness with international agreements relating to genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources].]

ALT 1

1 [The objectives of this instrument are to [enhance the [transparency] of the [IP] [patent] system to facilitate the possibility of ABS through the disclosure of country of origin or source of genetic resources in separate systems such as the CBD.]

ALT 2

1 [The objective of this instrument is to [promote][ensure][the effective protection of] [contribute to the prevention of] [prevent] the [misappropriation of] genetic resources [their derivatives] and [traditional knowledge associated with genetic resources] [through the] [in the context of the] [IP] [patents] system by:]

- (a) Ensuring that [IP] [patent] offices have access to the appropriate information on genetic resources [their derivatives] and [traditional knowledge associated with genetic resources] to prevent the granting of [erroneous] [IP] [patent] rights;
- (b) [Enhancing transparency in the [IP][patent] [and access and benefit sharing] system]; and,
- (c) [Ensuring] [promoting] [facilitating] [complementarity] [mutual supportiveness] with international agreements relating to the protection of genetic resources [their derivatives] and/or [traditional knowledge associated with genetic resources] [and those relating to IP].

### **[ARTICLE 2] SUBJECT MATTER OF INSTRUMENT**

2 This instrument applies to genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources].

ALT

[This instrument shall/should apply to patent applications for inventions directly based on genetic resources[, and traditional knowledge associated with genetic resources].]

## [II. [MANDATORY] DISCLOSURE]

### [ARTICLE 3] [DISCLOSURE REQUIREMENT]

3.1 Where the [subject matter] [claimed invention] within a [IP Rights] [patent] application [includes utilization of] [is directly based on] [is directly based on the utilization of]<sup>3</sup> genetic resources [their derivatives] and/or [traditional knowledge associated with genetic resources] each Party shall/should require applicants to:

- (a) Disclose the [providing country that is the country of origin] [country of origin [and]] [or [if unknown],] source of the genetic resources, [their derivatives] and/or [traditional knowledge associated with genetic resources.]
- (b) [Provide relevant information, as required by national law, regarding compliance with ABS requirements, including PIC, [in particular from indigenous [people(s)] and local communities], where appropriate.]
- (c) [If the source and/or [providing country that is the country of origin] [country of origin] is not known, a declaration to that effect.]

3.2 The disclosure requirement [shall/should/may] [does] not place an obligation on the [IP] [patent] offices to verify the contents of the disclosure. [But [IP] [patent] offices [*shall/should* provide guidance to [IP] [patent] applicants on how to meet disclosure requirement [*formalities*].]

3.3 A simple notification procedure shall/should be introduced by the [patent] [IP] offices that receive a declaration. [It would be adequate to identify in particular the Clearing House Mechanism of the CBD/ITPGRFA as the central body to which the [IP] [patent] offices shall/should send the available information.]

3.4 [Each Party shall/should make the information disclosed[, except for information related to privacy, business secrets, or other lawful confidentiality<sup>4</sup>,] publicly available at the time of application publication [or patent grant].]

3.5 [Genetic resources and [their derivatives] as found in nature or isolated therefrom shall/should not be considered as [inventions] [IP] and therefore no [IP] [patent] rights shall/should be granted.]

### [ARTICLE 4] [EXCEPTIONS AND LIMITATIONS]

4 [In complying with the obligation set forth in Article 3, members may, in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such justifiable exceptions and limitations do not unduly prejudice the implementation of this instrument.]

ALT

4.1 A [IP] [patent] disclosure requirement related to genetic resources [their derivatives] and [traditional knowledge associated with genetic resources] shall/should not apply to the following:

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<sup>3</sup> Some members noted a need for a definition for this formulation in the list of terms.

<sup>4</sup> An alternative formulation from the Nagoya Protocol Art. 14(2) is "without prejudice to the protection of confidential information".

- (a) [All [human genetic resources] [genetic resources taken from humans] [including human pathogens];]
- (b) [Derivatives];
- (c) [Commodities];[/genetic resources when they are used as commodities];
- (d) [Traditional knowledge in the public domain];
- (e) [Genetic resources from areas beyond national jurisdictions [and economic zones]]; and
- (f) [All genetic resources [acquired] [accessed] before [entry into force of the Convention on Biological Diversity] [before December 29<sup>th</sup> 1993]] [entry into force of the Nagoya Protocol on October 12, 2014].

4.2 [Member States shall/should not impose the disclosure requirement in this instrument on [IP] [patent] applications filed [or having a priority date] before entry into force of this instrument[, subject to national laws that existed prior to this instrument].]

## **[ARTICLE 5] SANCTIONS AND REMEDIES**

5 [Each [Party] [country] shall/should put in place appropriate, effective and proportionate legal and administrative measures to address non-compliance with paragraph 3.1[, including dispute resolution mechanisms]. Subject to national legislation, sanctions and remedies [shall/should] [may] [include, inter alia] consist of:

- (a) Pre-Grant.
  - (i) Suspending further processing of [IP] [patent] applications until the disclosure requirements are met.
  - (ii) A [IP] [patent] office considering the application withdrawn [in accordance with national law].
  - (iii) Preventing or refusing to grant an [IP right] [patent].
- (b) [Post-Grant].
  - (i) Publication of judicial rulings regarding failure to disclose.
  - (ii) [Fines or adequate compensation for damages, including payment of royalties.]
  - (iii) Other measures [including revocation, restorative justice, and economic compensation for holders of genetic resources, their derivatives, and [traditional knowledge associated with genetic resources] including indigenous peoples and/or local communities] may be considered, in accordance with national law.]]

ALT

[5.1 Each Party shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures to address non-compliance with Article 3, [including preventing further processing of patent applications.]]

[5.2 Material misstatements made with an intent to deceive the patent office regarding compliance with Article 3, shall be deemed perjury, lying to an official, or other similar infraction, and punishable as such in accordance with national law.]

5.3 [[Failure to fulfill the disclosure requirement] [incorrect or incomplete information], [in the absence of fraud], shall/should not affect the validity or enforceability of granted [IP] [patent] rights.]

## **[ALTERNATIVES TO ARTICLES 1, 2, 3, 4 & 5 NO NEW DISCLOSURE REQUIREMENT]**

### **ALT [ARTICLE 1] [OBJECTIVE]**

1 [The objective of this instrument is to prevent the grant of patent rights on inventions that are not novel, non-obvious, and industrially applicable.]

### **ALT [ARTICLE 3] [NO NEW DISCLOSURE REQUIREMENT]**

3.1 [IP] [patent] applicants may only be required to state where the genetic resource can be obtained if that location is necessary for a person skilled in the art to carry out the invention. Therefore no disclosure requirements can be imposed upon patent applicants or patentees for patents related to genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources], for reasons other than those related to novelty, inventive step, industrial applicability or enablement.]

3.2 [Where the subject matter of an invention is made using genetic resources obtained from an entity having a legal right over the genetic resource [(including a patent owner)], that entity may in the permit agreement or license granting the applicant access to the genetic resource or the right to use the genetic resource, require a patent applicant to:

- (a) include within the specification of a patent application and any patent issuing thereon a statement specifying that the invention was made using the genetic resource and other relevant information, and
- (b) obtain consent for uses not encompassed within the permit agreement or license.]

3.3 [Patent offices shall/should publish the entire disclosure of the patent on the Internet, on the date of the patent grant and shall/should strive to make the contents of the patent application publicly accessible over the Internet as well.]

3.4 [Where access to a genetic resource or [traditional knowledge associated with genetic resources] is not necessary to make or use the invention, information regarding the source or origin of genetic resource or the [traditional knowledge associated with the genetic resource] can be provided at any time after the filing date of the application.]

3.5 [Failure to examine a patent application in a timely manner shall/should result in an adjustment of the term of the granted patent to compensate the patentee for delays. Applicants shall/should be provided an opportunity to correct any incorrect or erroneous disclosures.]

### **[III. DEFENSIVE MEASURES/ DEFENSIVE MEASURES COMPLEMENTARY TO MANDATORY DISCLOSURE<sup>5</sup>]**

#### **[ARTICLE 6] [DUE DILIGENCE]**

6 Member states shall/should encourage or establish a fair and reasonable due diligence system to ascertain that [protected] genetic resources have been accessed in accordance with [applicable] access and benefit sharing legislation or regulatory requirements.

- (a) A database shall/should be used as a mechanism to allow monitoring of compliance with these due diligence requirements in accordance with national law. However, member states shall/should not be obliged to establish such databases.
- (b) Such databases shall/should be accessible to potential patent licensees [and potential investors] to confirm lawful chain of title of [protected] genetic resources upon which a patent is based.]

#### **[ARTICLE 7] [[PREVENTION OF THE [ERRONEOUS]<sup>6</sup> GRANT OF PATENTS] [PREVENTION OF THE GRANTING OF PATENTS WHICH DO NOT COMPLY WITH THE REQUIREMENTS FOR PATENTABILITY OF THE INVENTION] AND VOLUNTARY CODES OF CONDUCT]**

7.1 Member States shall/should:

- a. Provide legal, policy or administrative measures, as appropriate and in accordance with national law, to prevent patents from being granted [erroneously] with regard to claimed inventions that include genetic resources [their derivatives] and [traditional knowledge associated with genetic resources] where, under national law, those genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources]:
  - (i) anticipate a claimed invention (no novelty); or
  - (ii) obviate a claimed invention (obvious or no inventive step).
- b. Provide legal, policy or administrative measures, as appropriate and in accordance with national law, to allow third parties to dispute the validity of a patent, by submitting prior art, with regard to inventions that include genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources].
- c. [Encourage, as appropriate, the development and use of voluntary codes of conduct and guidelines for users regarding the protection of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources].]

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<sup>5</sup> Facilitators Note. Members should note that some members consider Defensive Measures as an alternative option to Disclosure while some other members consider them as a complementary option to Disclosure.

<sup>6</sup> A Member State requested to change this title to "Protection of the Demand of the Patents". However, the facilitators do not understand the meaning of this proposal and request clarification before such a change is made.

- d. Facilitate, as appropriate, the creation, exchange, dissemination of, and access to, databases [information associated with] of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] for use by patent offices.]

[7.2 As a complement to the disclosure obligation provided for in Article 3, and in the implementation of this instrument, the Contracting State may consider the use of databases on traditional knowledge and genetic resources in accordance with its needs, priorities, and safeguards as may be required under national laws and special circumstances.]

#### Database Search Systems

7.3 Members are encouraged to facilitate the establishment of databases [information associated with] of genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] for the purposes of search and examination of patent applications, in consultation with relevant stakeholders and taking into account their national circumstances, as well as the following considerations:

- (a) With a view towards interoperability, databases shall/should comply with minimum standards and structure of content.
- (b) Appropriate safeguards [such as filters] shall/should be developed in accordance with national law.
- (c) These databases will be accessible to patent offices [and other approved users].

#### WIPO Portal Site

7.4 Member States shall/should establish a database search system (the WIPO Portal) that links databases of WIPO members that contain information on genetic resources, [their derivatives] and non-secret [traditional knowledge associated with genetic resources] within their territory. The WIPO portal site will enable an examiner [and the public] to directly access and retrieve data from national databases. The WIPO Portal will also include appropriate safeguards [such as filters].]

## [IV. FINAL PROVISIONS]

### [ARTICLE 8]

#### RELATIONSHIP WITH INTERNATIONAL AGREEMENTS

8.1 This instrument shall/should establish a mutually supportive relationship [between [intellectual property] [patent] rights [directly based on] [involving] [the utilization of] genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources] and] [with] relevant [existing] international agreements and treaties.

ALT

8.1 [This instrument should be consistent with international IP agreements. Members recognize the coherent relationships between policies that promote the granting of patents involving the utilization of genetic resources and/or [traditional knowledge associated with genetic resources] and policies that promote the conservation of biological diversity, promote access to genetic resources, and the sharing of the benefits of such genetic resources.]

8.2 [This instrument shall/should complement and is not intended to modify other agreements on related subject matter, and shall/should support in particular, [the Universal Declaration on Human Rights, and] Article 31 of the UN Declaration on the Rights of Indigenous Peoples.]

8.3 [No provision in this instrument shall be interpreted as harming, or being to the detriment of the rights of indigenous people enshrined in the United Nations declaration on the rights of indigenous people. In the case of a conflict of laws, the rights of indigenous people enshrined in such declaration shall prevail and any interpretation shall be guided by the provisions of such declaration.]]

[8.4 The [PCT] and [PLT] shall/should be amended to [include] [enable Parties to the [PCT] and [PLT] to provide for in their national legislation] a mandatory disclosure requirement of the origin and source of the genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources]. [The amendments shall/should also include requiring confirmation of prior informed consent, evidence of benefit sharing under mutually agreed terms with the country of origin.]]

### **[ARTICLE 9] INTERNATIONAL COOPERATION**

9 [[Relevant WIPO bodies shall/should encourage Patent Cooperation Treaty members to] [The PCT Reform Working Group shall/should] develop a set of guidelines for [the search and examination of applications related to genetic resources, [their derivatives] and [traditional knowledge associated with genetic resources]] [administrative disclosure of origin or source] by the international search and examination authorities under the Patent Cooperation Treaty].

ALT

9 [Patent examination authorities should share information related to sources of information related to genetic resources and/or traditional knowledge, especially periodicals, digital libraries and databases of information related to genetic resources and traditional knowledge. WIPO Members should cooperate in the sharing of information related to genetic resources and knowledge, including traditional knowledge, regarding the use of genetic resources.]

### **[ARTICLE 10] TRANSBOUNDARY COOPERATION**

10 [In instances where the same genetic resources [, their derivatives] and [traditional knowledge associated with genetic resources] are found in in-situ conditions within the territory of more than one Party, those Parties shall/should endeavor to cooperate, as appropriate, with the involvement of indigenous [people[s]] and local communities concerned, where applicable, by taking measures that make use of customary laws and protocols, that are supportive of and do not run counter to the objectives of this instrument and national legislation.]

### **[ARTICLE 11] TECHNICAL ASSISTANCE, COOPERATION AND CAPACITY BUILDING**

11 [Relevant WIPO bodies [shall/should]] [WIPO shall/should] develop modalities for the creation, funding and implementation of the provisions under this instrument. WIPO [shall/should] provide technical assistance, cooperation, capacity building and financial support, subject to budgetary resources, for developing countries in particular the least developed countries to implement the obligations under this instrument.]

[Annex II follows]

**The Protection of Traditional Knowledge: Draft Articles**

**Facilitators' Rev. 2 (December 2, 2016)**

## PREAMBLE/INTRODUCTION

*Recognize value*

(i) *recognize the [holistic] [distinctive] nature of traditional knowledge and its [intrinsic] value, including its social, spiritual, [economic], intellectual, scientific, ecological, technological, [commercial], educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are [fundamentally] intrinsically important for indigenous [peoples] and local communities and have equal scientific value as other knowledge systems;*

*Promote awareness and respect*

(ii) *promote awareness and respect for traditional knowledge systems; for the dignity, cultural [integrity] heritage and intellectual and spiritual values of the traditional knowledge [holders]/[owners] who conserve, develop and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge [holders]/[owners]; and for the contribution which traditional knowledge [holders]/[owners] have made to the [conservation of the environment] conservation and sustainable use of biodiversity, to food security and sustainable agriculture, healthcare, and to the progress of science and technology;*

*Alternative*

(ii) *promote respect for traditional knowledge systems, for the dignity, cultural integrity and spiritual values of the traditional knowledge holders who conserve and maintain those systems;*

[End of alternative]

*Promote [conservation and] preservation of traditional knowledge*

(iii) *promote and support the [conservation of and] preservation [of] [and respect for] traditional knowledge [by respecting, preserving, protecting and maintaining traditional knowledge systems [and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems]];*

*[Consistency with relevant international agreements and processes*

(iv) *take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that relate to intellectual property and access to and benefit sharing from genetic resources which are associated with that traditional knowledge, [as well as the U.N. Declaration on the Rights of Indigenous Peoples;]]*

*[Promote access to knowledge and safeguard the public domain*

(v) *recognize the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain;]*

*[Document and conserve traditional knowledge*

*(vi) contribute to the documentation and conservation of traditional knowledge, encouraging traditional knowledge to be disclosed, learned and used in accordance with relevant customary practices, norms, laws, and/or understandings of traditional knowledge holders, including those customary practices, norms, laws and/or understandings that require prior informed consent or approval and involvement and mutually agreed terms before the traditional knowledge can be disclosed, learned or used by others;]*

*[Promote human rights*

*(vii) Recognize and protect that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits and that this right may not be subject to distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.]*

*Promote innovation*

*(viii) [the protection of traditional knowledge should] contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations;*

*Alt*

*[Innovation based on traditional knowledge may contribute to the transfer and dissemination of knowledge for the benefit of the holders and legitimate users of traditional knowledge, as long as it contributes to the facilitation of social and economic welfare and a balance of rights and obligations. The protection of the innovation derived from traditional knowledge empowers communities to manage and control the commercial exploitation of owned intellectual property, as well as collectively benefit from it;]*

*Provide new rules and disciplines*

*(ix) [recognize the need for new rules and disciplines concerning the provision of effective and appropriate means for the enforcement of rights relating to traditional knowledge, taking into account differences in national legal systems;]*

*Relationship with customary use*

*(x) not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context, [in accordance with national law].*

[ARTICLE 1

POLICY OBJECTIVES

Alt 1

This instrument should aim to:

1. Provide beneficiaries with the means to:
  - a. prevent the [misappropriation/illegal appropriation, misuse, and unauthorized use], of their traditional knowledge;
  - b. [control ways in which their traditional knowledge is used beyond the traditional and customary context;]
  - c. achieve the fair and equitable sharing of benefits arising from the use of their traditional knowledge, with prior informed consent or approval and involvement and taking customary law into consideration as appropriate; and
  - d. encourage and protect tradition-based creation and innovation, whether or not commercialized.

Alternative

- (d) encourage and protect creation and innovation, whether or not commercialized.

[2. Aid in the prevention of the grant of erroneous intellectual property/[patent rights] over [traditional knowledge and [[traditional knowledge] associated [with] genetic resources].]

Alt 2

This instrument should aim to prevent the [misuse]/[unlawful appropriation] of protected traditional knowledge and encourage creation and innovation.

Alt 3

The objective of this instrument is to [ensure][support] the [appropriate use] [protection] of traditional knowledge within the intellectual property system, in accordance with national law, recognizing the rights of [traditional knowledge holders][beneficiaries].

Alt 4

The objectives of this instrument are to:

- (a) contribute toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations;

- (b) recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain; and
- (c) prevent the erroneous grant of intellectual property rights [over traditional knowledge and traditional knowledge associated with genetic resources][that are directly based on protected traditional knowledge obtained by unlawful appropriation].

## ARTICLE 2

### USE OF TERMS

For the purposes of this instrument:

**[Misappropriation]** means

Alt 1

Any access or use of the [subject matter]/[traditional knowledge] without prior informed consent or approval and involvement and, where applicable, without mutual agreed terms, for whatever purpose (commercial, research, academic and technology transfer).

Alt 2

The use of protected traditional knowledge of another where the [subject matter]/[traditional knowledge] has been acquired by the user from the holder through improper means or a breach of confidence and which results in a violation of national law in the provider country, recognizing that acquisition of traditional knowledge through lawful means such as [independent discovery or creation], reading books, receiving from sources outside of intact traditional communities, reverse engineering, and inadvertent disclosure resulting from the holders' failure to take reasonable protection measures is not [misappropriation/misuse/unauthorized use/unfair and inequitable uses.]

Alt 3

Any access or use of traditional knowledge of the beneficiaries in violation of customary law and established practices governing the access or use of such traditional knowledge.

Alt 4

Any access or use of traditional knowledge of the [beneficiaries] indigenous [peoples] or local communities, without their free prior and informed consent and mutually agreed terms, in violation of customary law and established practices governing the access or use of such traditional knowledge.

**[Misuse]** may occur where the traditional knowledge which belongs to a beneficiary is used by the user in a manner that results in a violation of national law or measures endorsed by the legislature in the country where the use is carried out; the nature of the protection or safeguarding of traditional knowledge at the national level may take different forms such new

forms of intellectual property protection, protection based on principles of unfair competition or a measures-based approach or a combination thereof.]

**[Protected traditional knowledge]** is traditional knowledge that satisfies the criteria for eligibility under Article 1 and the scope and conditions for protection under Article 3.]

**[Public domain]** refers, for the purposes of this instrument, to intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

**[Publicly available]** means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[Alt 1

**Traditional knowledge** for the purposes of this instrument, is knowledge that is created, maintained, and developed by indigenous [peoples], local communities, [and nations/states], and that is linked with, or is an integral part of, the national or social identity and/or cultural heritage of indigenous [peoples], local communities,[and nations/states] ; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.]

[Alt 2

**Traditional knowledge** for the purposes of this instrument, is knowledge that is created, maintained, controlled, protected and developed by indigenous [peoples], local communities, [and nations] and that is directly linked with the social identity and/or cultural heritage of indigenous [peoples] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.]

**[Secret traditional knowledge]** is traditional knowledge that is held by beneficiaries under certain measures of secrecy, in accordance with customary law, and under the common understanding that the traditional knowledge is to be used and known only within the specific group.]

**[Sacred traditional knowledge]** is traditional knowledge that in spite of being secret, narrowly diffused, or widely diffused, constitutes part of the spiritual identity of the beneficiaries.]

**[Narrowly diffused traditional knowledge]** is traditional knowledge that is shared by beneficiaries amongst whom measures to keep it secret are not taken, but is not easily accessible to non-group members.]

**[Widely diffused traditional knowledge]** is traditional knowledge which is easily accessible by the public but is still culturally connected to its beneficiaries' social identity.]

**[Unlawful appropriation]** is the use of protected traditional knowledge that has been acquired by a user from a traditional knowledge holder through improper means or a breach of

confidence which results in a violation of national law in the traditional knowledge holder's country. Use of protected traditional knowledge that has been acquired by lawful means such as independent discovery or creation, reading publications, reverse engineering, and inadvertent or deliberate disclosure resulting from the traditional knowledge holders failure to take reasonable protective measures, is not unlawful appropriation.]

**[Unauthorized use** is use of protected traditional knowledge without the permission of the right holder.]

**[["Use"]/["utilization"]** means

- (a) where the traditional knowledge is included in a product [or] where a product has been developed or obtained on the basis of traditional knowledge:
  - (i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
  - (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
- (b) where the traditional knowledge is included in a process [or] where a process has been developed or obtained on the basis of traditional knowledge:
  - (i) making use of the process beyond the traditional context; or
  - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process;
- (c) the use of traditional knowledge in non-commercial research and development; or
- (d) the use of traditional knowledge in commercial research and development.]

[ARTICLE 3

SUBJECT MATTER OF THE INSTRUMENT

Alt 1

This instrument applies to traditional knowledge.

Alt 2

The subject matter of this instrument is traditional knowledge, which is knowledge that is created and maintained in a collective context, that is directly linked with the social identity and/or cultural heritage of indigenous [peoples] and local communities [and nations]; that is transmitted between generations or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms.

Alt 3

This instrument applies to traditional knowledge.

Criteria for Eligibility

In order to be eligible for protection under this instrument, traditional knowledge must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has been determined by each Member State, but not less than for 50 years or a period of five generations.

Alt 4

This instrument applies to traditional knowledge. In order to be eligible for protection under this instrument, traditional knowledge must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation.]

[ARTICLE 4

BENEFICIARIES OF PROTECTION

Alt 1

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold protected traditional knowledge.

Alt 2

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries, [such as states [and/or nations]], as may be determined under national law.]

## [ARTICLE 5

## SCOPE OF [AND CONDITIONS OF] PROTECTION

[Alt 1

Member States [should/shall] safeguard the economic and moral interests of the beneficiaries concerning [protected] traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner.]

[Alt 2

Member States [should/shall] safeguard the economic and moral interests of the beneficiaries concerning traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, in particular:

- (a) Where the traditional knowledge is secret, whether or not it is sacred, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
  - i. Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use.
  - ii. Beneficiaries have the moral right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- (b) Where the traditional knowledge is narrowly diffused, whether or not it is sacred, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
  - i. Beneficiaries receive a fair and equitable share of benefits arising from its use; and
  - ii. Beneficiaries have the moral right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- (c) Where the traditional knowledge is not protected under paragraphs (a) or (b), Member States [should/shall] use best endeavors to protect the integrity of traditional knowledge, in consultation with beneficiaries where applicable.

[Alt 3

5.1 Where the protected traditional knowledge is secret, whether or not it is sacred, Member States [should/shall] ensure that:

- (a) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their protected traditional knowledge; and receive a fair and equitable share of benefits arising from its use.

- (b) Users attribute said protected traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.
- 5.2 Where the protected traditional knowledge is narrowly diffused, whether or not it is sacred, Member States [should/shall] ensure that:
  - (a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and
  - (b) Users identify clearly-discernable holders of the traditional knowledge when using said traditional knowledge, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.
- 5.3 Member States should use best endeavors [, in consultation with indigenous and local communities,] to protect the integrity of protected traditional knowledge that is widely diffused [and sacred].]

## [ARTICLE 5BIS

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

## Database Protection

Recognizing the importance of cooperation and consultation with indigenous 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:

5BIS.1 Publicly accessible national traditional knowledge databases 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 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 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;
- (ii) there should be minimum standards to harmonize the structure and content of such databases;
- (iii) 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.]

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 to Article 2 is included in a database, the protected traditional knowledge should only be made available to others with the prior 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, and thus [should]/[shall] not include protected traditional knowledge.

5BIS.8 Efforts [should]/[shall] be made by national authorities to 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.]

## [ARTICLE 6

## SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

## Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument.

## Alt 2

6.1 [Member States [should]/[shall] ensure that [accessible, appropriate and adequate] [criminal, civil [and] or administrative] enforcement procedures[, dispute resolution mechanisms][, sanctions] [and remedies] are available under their laws against the [willful or negligent [harm to the economic and/or moral interest]] [infringement of the protection provided to traditional knowledge under this instrument] [[misappropriation/ misuse/unauthorized use/unfair and inequitable uses] or misuse of traditional knowledge] sufficient to constitute a deterrent to further infringements.]

6.2 The procedures referred to in Paragraph 1 should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for [holders]/[owners] of protected traditional knowledge. [These procedures should also provide safeguards for legitimate third party interests and the public interest.]

6.3 [The beneficiaries [should]/[shall] have the right to initiate legal proceedings where their rights under Paragraphs 1 and 2 are violated or not complied with.]

6.4 [Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.]

6.5 [Where a dispute arises between beneficiaries or between beneficiaries and users of traditional knowledge, each party [may]/[shall be entitled to] refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or [, if both parties are from the same country, by] national law [, and that is most suited to the holders of traditional knowledge].]

6.6 [Where, under applicable domestic law, the [intentional] wide diffusion of [protected subject matter]/[traditional knowledge] beyond a recognizable community of practice has been determined to be the result of an act of [misappropriation/misuse/unauthorized use/unfair and inequitable uses] or other violation of national law, the beneficiaries shall be entitled to fair and equitable compensation/royalties.]

6.7 If an infringement of the rights protected by this instrument is determined in the procedure established in Paragraph 6.1, the sanctions may consider the inclusion of restorative justice measures, according to the nature and effect of the infringement.]

[ARTICLE 7

DISCLOSURE REQUIREMENT

Alt 1

Where required by national law, the users of traditional knowledge shall comply with requirements concerning the disclosure of source and/or origin of traditional knowledge.

Alt 2

7.1 Intellectual property applications that concern [an invention] any process or product that relates to or uses traditional knowledge shall include information on the country from which the [inventor] applicant collected or received the knowledge (the providing country), and the country of origin if the providing country is not the same as the country of origin of the traditional knowledge. The application shall also state whether prior informed consent or approval and involvement to access and use has been obtained.]

7.2 [If the information set out in Paragraph 1 is not known to the applicant, the applicant shall state the immediate source from which the [inventor] applicant collected or received the traditional knowledge.]

7.3 [If the applicant does not comply with the provisions in Paragraphs 1 and 2, the application shall not be processed until the requirements are met. The intellectual property office may set a time limit for the applicant to comply with the provisions in paragraphs 1 and 2. If the applicant does not submit such information within the set time limit, the intellectual property office may reject the application.]

7.4 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has failed to comply with mandatory requirements or provided false or fraudulent information.]

Alt 3

7.1 [[Patent] intellectual property applications that concern [an invention] any process or product that [relates to or] [directly] uses protected traditional knowledge shall include information on the country from which the [inventor] applicant collected or received the protected traditional knowledge (the providing country), and the country of origin if the providing country is not the same as the country of origin of the protected traditional knowledge. The application shall also state whether prior informed consent or approval and involvement to access and use has been obtained.]

7.2 [If the information set out in Paragraph 1 is not known to the applicant, the applicant shall state the immediate source from which the [inventor] applicant collected or received the protected traditional knowledge.]

7.3 [If the applicant does not comply with the provisions in Paragraphs 1 and 2, the application shall not be processed until the requirements are met. The [patent] intellectual property office may set a time limit for the applicant to comply with the provisions in paragraphs 1 and 2. If the applicant does not submit such information within the set time limit, the [patent] intellectual property office may reject the application.]

7.4 [Rights arising from a granted patent shall not be affected by [any later discovery of] a failure by the applicant to comply with the provisions in Paragraphs 1 and 2. Other sanctions, outside of the patent system, provided for in national law, including criminal sanctions such as fines, may however be imposed.]

7.5 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has knowingly provided false or fraudulent information.]

Alt 4

[NO DISCLOSURE REQUIREMENT

Patent disclosure requirements shall not include a mandatory disclosure requirement relating to traditional knowledge unless such disclosure is material to the patentability criteria of novelty, inventive step or enablement.]]

[ARTICLE 8

ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]

Alt 1

[Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a competent authority or authorities, with the [direct involvement and approval of] [free, prior and informed consent of] [in consultation with] [beneficiaries] [traditional knowledge holders], in accordance with their national law [to administer the rights/interests provided for by this instrument] [and without prejudice to the right of [beneficiaries] [traditional knowledge holders] to administer their rights/interests according to their customary protocols, understandings, laws and practices].

Alt 2

[Member States]/[Contracting Parties] may establish, or designate, a competent authority, or authorities, in accordance with national law, to administer the rights/interests provided for by this [instrument].

Alt 3

Member States may establish competent authorities, in accordance with national and customary law, that are responsible for the national traditional knowledge databases provided for by this [instrument]. Responsibilities may include the receipt, documentation, storage and online publication of information relating to traditional knowledge.]

## [ARTICLE 9

## EXCEPTIONS AND LIMITATIONS

## Alt 1

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries nor unduly prejudice the implementation of this instrument.

## Alt 2

## General Exceptions

9.1 [Member States]/[Contracting Parties] may adopt appropriate limitations and exceptions under national law [with the prior informed consent or approval and involvement of the beneficiaries] [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional knowledge:

- (a) [acknowledges the beneficiaries, where possible;]
- (b) [is not offensive or derogatory to the beneficiaries;]
- (c) [is compatible with fair practice;]
- (d) [does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and]
- (e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

9.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional knowledge, [Member States]/[Contracting Parties] [may]/[shall]/[should] not establish exceptions and limitations.]

## Specific Exceptions

9.3 [[In addition to the limitations and exceptions provided for under Paragraph 1,] [Member States]/[Contracting Parties] may adopt appropriate limitations or exceptions, in accordance with national law, for the following purposes:

- (a) teaching, learning, but not research resulting in profit-marking or commercial purposes;
- (b) for preservation, display, research and presentation in archives, libraries, museums or cultural institutions, for non-commercial cultural heritage or other purposes in the public interest; and
- (c) in the case of a national emergency or other circumstances of extreme urgency, to protect public health or the environment [or in cases of public non-commercial use];
- (d) [the creation of an original work of authorship inspired by traditional knowledge];

- e. to exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

This provision, with the exception of Subparagraph (c), [should]/[shall] not apply to traditional knowledge described in Article 5(a)/5.1.]

9.4 Regardless of whether such acts are already permitted under Paragraph 1, the following shall be permitted:

- (a) the use of traditional knowledge in cultural institutions recognized under the appropriate national law, archives, libraries, museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted; and
- (b) the creation of an original work of authorship inspired by traditional knowledge.]

9.5 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 5 shall not apply to any use of knowledge that:]

- (a) has been independently created [outside the beneficiaries' community];
- (b) [legally] derived from sources other than the beneficiary; or
- (c) is known [through lawful means] outside of the beneficiaries' community.]

9.6 [Protected traditional knowledge shall not be deemed to have been misappropriated or misused if the protected traditional knowledge was:

- (a) obtained from a printed publication;
- (b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent or approval and involvement; or
- (c) mutually agreed terms for [access and benefit sharing]/[fair and equitable compensation] apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.]]

9.7 [National authorities shall exclude from protection traditional knowledge that is already available without restriction to the general public.]

Alt 3

In complying with the obligations set forth in this instrument, Member States may adopt exceptions and limitations as may be determined under national and customary law.]

ARTICLE 10

TERM OF PROTECTION/RIGHTS

[Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional knowledge in accordance with [Article 5/[which may] [should]/[shall] last as long as the traditional knowledge fulfills/satisfies the [criteria of eligibility for protection] according to Article [3]/[5].]

ARTICLE 11  
FORMALITIES

Alt 1

[Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional knowledge to any formality.

Alt 2

[[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional knowledge.]

Alt 3

[The protection of traditional knowledge under Article 5 [should]/[shall] not be subject to any formality. However, in the interest of transparency, certainty and the conservation of traditional knowledge, the relevant national authority (or authorities) or intergovernmental regional authority (or authorities) may maintain registers or other records of traditional knowledge to facilitate protection under Article 5.]

## ARTICLE 12

### TRANSITIONAL MEASURES

12.1 These provisions [should]/[shall] apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article [3]/[5].

#### *Optional addition*

12.2 [[Member States]/[Contracting Parties] [should]/[shall] ensure [the necessary measures to secure] the rights [acknowledged by national law] already acquired by third parties are not affected, in accordance with its national law and its international legal obligations.]

#### *Alternative*

12.2 [[Member States]/[Contracting Parties] [should]/[shall] provide that continuing acts in respect of traditional knowledge that had commenced prior to the coming into force of this [instrument] and which would not be permitted or which would be otherwise regulated by this [instrument], [should be brought into conformity with these provisions within a reasonable period of time after its entry into force[, subject to respect for rights previously acquired by third parties in good faith]/should be allowed to continue].

#### *Alternative*

12.2 [Notwithstanding Paragraph 1, [Member States]/[Contracting Parties] [should]/[shall] provide that:

- (a) anyone who, before the date of entry into force of this instrument, has commenced utilization of traditional knowledge which was legally accessed, may continue such utilization of the traditional knowledge[, subject to a right of compensation];
- (b) such right of utilization shall also, on similar conditions, be enjoyed by anyone who has made substantial preparations to utilize the traditional knowledge.
- (c) the foregoing gives no right to utilize traditional knowledge in a way that contravenes the terms the beneficiary may have set out as a condition for access.]

[ARTICLE 13

RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS

13.1 This instrument [should]/[shall] establish a mutually supportive relationship [between [intellectual property [patent] rights [directly based on] [involving] [the utilization of] traditional knowledge and with relevant [existing] international agreements and treaties.]

[13.2 Nothing in this instrument shall be interpreted as prejudicing or detrimental to the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.]

[13.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretation shall be guided by the provisions of the said Declaration.]

ARTICLE 14

NON-DEROGATION

Nothing in this [instrument] may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.

## [ARTICLE 15

## NATIONAL TREATMENT

[The rights and benefits arising from the protection of traditional knowledge under national/domestic measures or laws that give effect to these international provisions [should]/[shall] be available to all eligible beneficiaries who are nationals or residents of a [Member State]/[Contracting Party] [prescribed country] as defined by international obligations or undertakings. Eligible foreign beneficiaries [should]/[shall] enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.]

*Alternative*

[Nationals of a [Member State]/[Contracting Party] may only expect protection equivalent to that contemplated in this instrument in the territory of another [Member State]/[Contracting Party] even where that other [Member State]/[Contracting Party] provides for more extensive protection for their nationals.]

*[End of alternative]*

*Alternative*

[Each [Member State]/[Contracting Party] [should]/[shall] in respect of traditional knowledge that fulfills the criteria set out in Article 3, accord within its territory to beneficiaries of protection as defined in Article 4, whose members primarily are nationals of or are domiciled in the territory of, any of the other [Member States]/[Contracting Parties], the same treatment that it accords to its national beneficiaries.]

*[End of alternative]*

[ARTICLE 16

TRANSBOUNDARY COOPERATION

Where the same [protected] traditional knowledge [under Article 5] is found within the territory of more than one [Member State]/[Contracting Party], or is shared by one or more indigenous and local communities in several [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objectives of this [instrument].]

[Annex III follows]

# **The Protection of Traditional Cultural Expressions: Draft Articles**

**Facilitators' Rev. 2 (June 15, 2017)**

[PRINCIPLES/PREAMBLE/INTRODUCTION]

1. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.
2. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.
3. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity.
4. [Recognizing]/[to recognize] the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.
5. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.
6. [Contributing]/[to contribute] to the promotion and protection of the diversity of traditional cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].
7. [Recognizing]/[to recognize] the importance of protection, preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.
8. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]
9. [[Acknowledging]/[to acknowledge] that the protection of traditional cultural expressions should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional cultural expressions and in a manner conducive to social and economic welfare and to a balance of rights and obligations.]
10. [[Recognizing]/[to recognize] the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.]
11. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free prior informed consent and approval and involvement of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]

12. [To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

13. [Nothing in this [instrument] may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.]

[ARTICLE 1  
POLICY OBJECTIVES

*Alt 1*

This instrument should aim to:

1.1 Provide beneficiaries with the means to:

- (a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of their traditional cultural expressions;
- (b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary;
- (c) promote the equitable compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary; and
- (d) encourage and protect tradition-based creation and innovation.

*Option*

- (d) encourage and protect creation and innovation.

1.2 Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.

*Alt 2*

This instrument should aim to:

- (a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions];
- (b) encourage creation and innovation;
- (c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange;
- (d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain; and
- (e) [aid in the prevention of the erroneous grant [or assertion] of intellectual property rights over traditional cultural expressions.]

*Alt 3*

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, [and to recognize][recognizing] the rights of [beneficiaries] [indigenous [peoples] and local communities].

*Alt 4*

The objective of this instrument is to prevent misappropriation, misuse, or offensive use of, and to protect, traditional cultural expressions, and to recognize the rights of indigenous [peoples] and local communities.]

[ARTICLE 2  
USE OF TERMS

For the purposes of this instrument:

**Traditional cultural expression** means any form of [artistic and literary], [*other* creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions<sup>7</sup>, materials<sup>8</sup>, music and sound<sup>9</sup>, verbal<sup>10</sup> and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.

*Alternative*

**Traditional cultural expressions** comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.

**[Public domain** refers, for the purposes of this instrument, to tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

*Alternative*

**Public domain** means the public domain as defined by national law.

**[Publicly available** means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

**[[“Use”]/[“Utilization”]** means

- (a) where the traditional cultural expression is included in a product:
  - (i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

<sup>7</sup> [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

<sup>8</sup> [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

<sup>9</sup> [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

<sup>10</sup> [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

- (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.
- (b) where the traditional cultural expression is included in a process:
  - (i) making use of the process beyond the traditional context; or
  - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
- (c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]

[ARTICLE 3

[ELIGIBILITY CRITERIA FOR [PROTECTION]/[SAFEGUARDING]]/[SUBJECT MATTER OF [THE INSTRUMENT]/[PROTECTION]]

*Alt 1*

This instrument applies to traditional cultural expressions.

*Alt 2*

The subject matter of [protection]/[this instrument] is traditional cultural expressions:

- (a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities;
- (b) that are the unique product of, and directly linked with, the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities;
- (c) that are transmitted from generation to generation, whether consecutively or not;
- (d) that have been used for a term as has been determined by each [Member State]/ [Contracting Party] but not less than 50 years/or a period of five generation; and
- (e) that are the result of creative and literary or artistic intellectual activity.

*Alt 3*

This instrument applies to traditional cultural expressions. In order to be eligible for protection under this instrument, traditional cultural expressions must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation, and which may be dynamic and evolving.]

[ARTICLE 4

BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]

*Alt 1*

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.

*Alt 2*

The beneficiaries of this instrument are indigenous [peoples], local communities, [and]/[and where there is no notion of indigenous [peoples]], other beneficiaries as may be determined under national law.

*Alt 3*

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.

*Alt 4*

The beneficiaries of this instrument are indigenous [peoples], as well as local communities and other beneficiaries, as may be determined by national law, [who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions].]

## [ARTICLE 5

## SCOPE OF [PROTECTION]/[SAFEGUARDING]

*Alt 1*

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

*Alt 2*

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.

5.2 Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.

5.3 Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.

*Alt 3**Option 1*

5.1 Where the protected traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

- (a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:
  - i. [create,] maintain, control and develop said protected traditional cultural expressions;
  - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret protected traditional cultural expressions;

iii. [authorize or deny the access to and use/[utilization] of said protected traditional cultural expressions based on free prior and informed consent or approval and involvement and mutually agreed terms;]

iv. protect against any [false or misleading] uses of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and

v. [prevent] prohibit use or modification which distorts or mutilates a protected traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.

(b) encourage users [to]:

i. attribute said protected traditional cultural expressions to the beneficiaries;

ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions]; and

iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions.

5.2 [Where the protected traditional cultural expression is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], Member States should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to encourage users [to]:

(a) attribute and acknowledge the beneficiaries as the source of the protected traditional cultural expressions, unless the beneficiaries decide otherwise, or the protected traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]

(b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions;

(c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions[; and][.]

(d) [refrain from any [false or misleading uses] of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

5.3 [Where the protected traditional cultural expressions is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, Member States should/shall encourage users of said protected traditional cultural expressions [to], in accordance with national law:

(a) attribute said protected traditional cultural expressions to the beneficiaries;

- (b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions;
- (c) [protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[;]] [and]
- (d) where applicable, deposit any user fee into the fund constituted by such Member State.]

*Option 2*

5.1 Member States should/shall safeguard the economic and moral interests of the beneficiaries concerning their protected traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

5.3 Protection/safeguarding under this instrument(s) does not extend to uses of protected traditional cultural expressions: (1) for archival, uses by museums, preservation, research and scholarly uses, and cultural exchanges; and (2) to create literary, artistic, and creative works that are inspired by, borrowed from, derived from, or adapted from protected traditional cultural expressions.]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

*Alt 1*

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

*Alt 2*

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument].

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

[ARTICLE 7  
EXCEPTIONS AND LIMITATIONS

*Alt 1*

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.

*Alt 2*

In implementing this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.
2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:
  - (a) learning teaching and research;
  - (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
  - (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.
3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2).
4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.

*Alt 3*

In [complying with the obligations set forth in]/[implementing] this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.

*Alt 4*

## General Exceptions

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional cultural expressions:

- (a) [acknowledges the beneficiaries, where possible;]
- (b) [is not offensive or derogatory to the beneficiaries;]
- (c) [is compatible with fair use/dealing/practice;]
- (d) [does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and]
- (e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

*Alternative*

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

- (a) are limited to certain special cases;
- (b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]
- (c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]
- (d) [ensure that the [use] of traditional cultural expressions:
  - i. is not offensive or derogatory to the beneficiaries;
  - ii. acknowledges the beneficiaries, where possible;] and
  - iii. [is compatible with fair practice.]]]

*[End of Alternative]*

7.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional cultural expressions, [Member States]/[Contracting Parties] [may]/[should]/[shall] not establish exceptions and limitations.]

## Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

- (a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]
- (b) [for preservation, [display], research and presentation in archives, libraries, museums or other cultural institutions recognized by national law, for non-commercial cultural heritage or other purposes in the public interest;]
- (c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]

7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

- (a) [the use of traditional cultural expressions in cultural institutions recognized under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, [display], research and presentation;]
- (b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]
- (c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]
- (d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]

7.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, for works protected by [intellectual property rights [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].]

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

*Option 1*

8.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [this [instrument]/[[which may] [should]/[shall] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to this [instrument], and in consultation with beneficiaries.]]

8.2 [Member States]/[Contracting Parties] may determine that the protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, [should]/[shall] last indefinitely.

*Option 2*

8.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3.

*Option 3*

8.1 [[Member States]/[Contracting Parties] may determine that the term of protection of traditional cultural expressions, at least as regards their economic aspects, [should]/[shall] be limited.]]

[ARTICLE 9]  
FORMALITIES

*Option 1*

9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.

*Option 2*

9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.

[ARTICLE 10

[SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]

*Alt 1*

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.

*Alt 2*

10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.

*Alt 3*

Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.

*Alt 4*

Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.]

[ARTICLE 11]

[TRANSITIONAL MEASURES]

11.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the time of the [instrument] coming into effect/force, fulfill the criteria set out in this [instrument].

11.2 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] secure the rights acquired by third parties under national law prior to the entry into effect/force of this [instrument]].

11.2 *Option 2* Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of this [instrument] and which would not be permitted or which would be otherwise regulated by the [instrument], [[should]/[shall] be brought into conformity with the [instrument] within a reasonable period of time after its entry into effect/force, subject to Paragraph 3]/[[should]/[shall] be allowed to continue].

11.3 With respect to traditional cultural expressions that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]

[ARTICLE 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS

12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.]

[12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]

[ARTICLE 13]

[NATIONAL TREATMENT

Each [Member State]/[Contracting Party] [should]/[shall] accord to beneficiaries that are nationals of other [Member States]/[Contracting Parties] treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this [instrument].]

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13  
NO SUCH PROVISIONS]

[ARTICLE 14]

[TRANSBOUNDARY COOPERATION

In instances where [protected] traditional cultural expressions are located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary [protected] traditional cultural expressions., with the involvement of indigenous [peoples] and local communities concerned, where applicable, with a view to implementing this [instrument].]

ARTICLE 15

[CAPACITY BUILDING AND AWARENESS RAISING

15.1 [Member States]/[Contracting Parties] [should]/[shall] cooperate in the capacity building and strengthening of human resources, in particular, those of the beneficiaries, and the development of institutional capacities, to effectively implement the [instrument].

15.2 [Member States]/[Contracting Parties] [should]/[shall] provide the necessary resources for indigenous [peoples] and local communities and join forces with them to develop capacity-building projects within indigenous [peoples] and local communities, focused on the development of appropriate mechanisms and methodologies, such as new electronic and didactical material which are culturally adequate, and have been developed with the full participation and effective participation of indigenous [peoples] and local communities and their organizations.

15.3 [In this context, [Member States]/[Contracting Parties] [should]/[shall] provide for the full participation of the beneficiaries and other relevant stakeholders, including non-government organizations and the private sector.]

15.4 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument,] and in particular educate users and holders of traditional cultural expressions of their obligations under this instrument.]

[End of Annex III and of document]