

## Information Note<sup>1</sup>

### for IGC 37

Prepared by Mr. Ian Goss, the IGC Chair

#### Introduction

1. In accordance with the IGC's mandate for 2018/2019 and the work program for 2018, IGC 37 should undertake negotiations on traditional knowledge (TK)/traditional cultural expressions (TCEs) with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s).

2. To assist Member States in their preparations for IGC 37, I have prepared this information note, summarizing the unresolved and cross-cutting issues and some other issues relating to TK/TCEs that Member States may wish to give focused attention to.

3. As an Annex, I have prepared a table which sets out in two parallel columns the texts of the draft articles on TK (document WIPO/GRTKF/IC/37/4) and TCEs (document WIPO/GRTKF/IC/37/5), listed by issue, for ease of reference and comparison.

**4. I emphasize that the views in this note are mine alone and are without prejudice to any Member States' positions on the issues discussed. As an information note, it has no status, nor is it a working document for the session. It is only a paper to assist participants in their preparations for IGC 37. The Annex could also perhaps be used as a resource to guide and frame the discussions in the session itself.**

5. Where relevant, Member States are strongly encouraged to reflect on whether, for some concepts, the international instrument(s) should simply provide a policy framework(s) or possible minimum and/or maximum standards and allow for the more detailed articulation of those concepts, as well as issues of implementation, to be determined at the national level.

6. I would also encourage Member States to show flexibility and pragmatism, and make a concerted effort towards "reaching agreement" (as referred to in the IGC's mandate), and to do so in a spirit of negotiation and compromise.

#### Cross-cutting Issues for Consideration by IGC 37

7. After carefully comparing the current drafts of the TK and TCEs texts, it seems to me that most of issues addressed in the texts are "cross-cutting". By this I mean that many of the same policy and technical issues arise in both texts. This is to be expected given the close similarity between the two subject matters, TK and TCEs. Indeed, indigenous peoples, amongst others, have long argued that the two subject areas are interconnected parts of a whole. However, recognizing that, within intellectual property (IP) discourse, TK and TCEs raise some distinct IP questions and have, historically, been treated distinctly, the IGC has, so far, largely worked on each text in parallel but separately.<sup>2</sup> This has meant that, in some cases, the same or very similar policy and legal issues might be addressed differently in the two texts and opportunities for direct comparison and coordination between the texts, where

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<sup>1</sup> Note from the WIPO Secretariat: The Chair of the IGC, Mr. Ian Goss, has prepared this information note to assist Member States in their preparations for IGC 37.

<sup>2</sup> I note, however, that IGC 27 (in April 2014) and IGC 28 (in July 2014) worked on cross-cutting issues.

necessary and so desired, may have been missed. By contrast, IGCs 37, 38, 39 and 40 enable IGC participants to work on both texts at the same time, side-by-side, thus providing an opportunity to make the changes that they consider appropriate to simplify and improve the texts in a coordinated, coherent and holistic way. IGC 37 is the first of four sessions specifically dedicated to enabling a cross-cutting discussion of TK/TCEs, the others being IGCs 38 and 39 and, partially, IGC 40. Taking into account that the IGC has almost four full sessions to address TK/TCEs, I will make suggestions separately as to what ground that I suggest IGC 37 could cover as a start.

#### Preamble/Introduction

8. A preamble does not form part of the legally binding or operative text of a multilateral instrument, though it does aid in interpretation of the operative provisions by providing context to the instrument and to the intent of the drafters. The language is usually reflected as principles whether the instrument is declaratory or legally binding.

9. The preamble/introduction section of the TK text includes ten paragraphs, while the one of the TCEs text includes 13 paragraphs.

10. The IGC could verify their relevance and reflect on which of the concepts are most directly related to IP, since the IGC's mandate is to reach an agreement on an international legal instrument(s) relating to IP for the balanced and effective protection of TK and TCEs.

#### Policy objectives (Article 1 of the TK text and Article 1 of the TCEs text)

11. Objectives are fundamental to the development of the operative text of any instrument as they detail the purpose(s) and intent of the instrument. This could result in simple, direct and efficient wording and bring clarity to the text.

12. Both the TK and TCEs texts include four alternatives. Alt 1 of both texts seems to follow the same approach. The IGC could consider whether there are areas of possible convergence among different alternatives and formulations.

13. In reviewing these alternatives, it would be useful for Member States to consider the policy objectives from the perspective of all interests, namely the interests of the beneficiaries, the users and the public, noting that the current alternatives tend to be framed from a single perspective. For example, the TK text appears to frame one alternative from the beneficiaries' perspective and the second alternative focuses on balancing the interests of the beneficiaries with the protection of the public domain and artistic freedom.

14. The IGC could also consider rationalizing the texts to avoid redundancies and irrelevancies, in particular within the preamble section, and focus on common, concisely-stated core IP-related objectives for the instrument(s). Examples of IP-focused objectives could include, broadly, *inter alia*, the prevention of misappropriation and misuse, the promotion of innovation and creativity, and the prevention of improper or erroneous grant of IP rights.

15. In identifying IP-related objectives, Member States could consider and reflect on the type of harm(s) that an IP instrument(s) on TK and TCEs would seek to address and on the gaps that may currently exist and that ought, from a policy perspective, to be filled. I would like to note that the Secretariat has, as requested, updated the 2008 Draft Gap Analyses on TK and TCEs (documents WIPO/GRTKF/IC/37/6 and WIPO/GRTKF/IC/37/7, respectively).

16. There should also be a distinction between operative language and objectives, as well as a direct correlation between the objectives of protection and the operative/substantive provisions.

Definition of “misappropriation” (Article 2 of the TK text)

17. The TK and TCEs texts both make reference to the concept of “misappropriation”. The TK text carries a proposed definition of misappropriation, whereas the TCEs text does not do so. The concept of misappropriation is also being discussed by the IGC in the context of genetic resources (GRs), although there has so far been no agreement on its meaning or on the need to specifically define it in that context.

18. The IGC may consider whether, in relation to TK and/or TCEs, a definition of misappropriation is necessary, or its meaning could be interpreted in good faith in accord with the ordinary meaning to be given to the term in its context and in light of the objective and purpose of the international legal instrument(s).<sup>3</sup>

19. I would also like to note that definitions of “misuse”, “unlawful appropriation” and “unauthorized use” are included in the TK text. It might be useful to revisit all these terms once other issues become clearer. These terms are used but not defined in the TCEs text.

Definitions of public domain and publicly available (Article 2 of the TK text and Article 2 of the TCEs text)

20. IGC 27 introduced into the TK and TCEs texts a definition of the term “public domain.” This fundamental concept is integral to the balance inherent in the IP system. Exclusive rights are balanced against the interests of users and the general public, with the intent to foster and stimulate follow-on innovation and creativity and access to works and inventions once they are no longer protected.

21. There are currently two alternatives related to the use of the term “public domain” in Article 2 of the TCEs text. While the first alternative proposes a definition for the term “public domain”, the second one simply refers to the definition of that term in national law. The TK text includes a definition for the term “public domain”, which is similar to the one in the TCEs text, except that the definition of “public domain” in the TCEs text makes reference to “tangible and intangible materials”, whereas the TK text only makes reference to “intangible materials”. The IGC could consider aligning the definitions in both texts.

22. That said, while the public domain concept is relevant to understanding the interface between IP and TK/TCEs and to the design of a balanced and effective IP-like system of protection for TK and TCEs, the merits of developing and including a specific definition of the “public domain” within the TK and TCEs instruments are unclear. I believe that defining the “public domain” is a challenging exercise with significant and wide-reaching policy ramifications going beyond the scope of the IGC.

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<sup>3</sup> See Article 31 of the Vienna Convention, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

23. The concept of “public domain” also links to the understanding of the related concept of “publicly available”<sup>4</sup>. The same definition of this term is included in both TK and TCEs texts.

*Definition of use/utilization (Article 2 of the TK text and Article 2 of the TCEs text)*

24. Similar definitions of use/utilization are included in the TK and TCEs texts. The definition in the TCEs text was imported from the TK text and it seems unclear whether that definition would really be applicable to TCEs.

25. As pointed out by a delegation during IGC 27, the definition of “Use/Utilization” refers to “use” outside the traditional context. However, the word “use” in Alts 1 and 4 of Article 4 of the TCEs text, and in both Articles 5 of the TK and TCEs texts, refers to use by the beneficiaries. In other words, the same word is not used in the same sense in different parts of the texts. The IGC might wish to find a way to avoid any confusion that may arise from this.

*Criteria for Eligibility (Article 3 of the TK text and Article 3 of the TCEs text)*

26. The TK text includes three formulations of criteria for eligibility while the TCEs text includes two. The definitions of TK and TCEs in the Use of Terms sections also include some language regarding criteria for eligibility. The IGC may wish to consider the appropriate place to deal with the criteria for eligibility.

27. There are still divergent views as to what the substantive eligibility criteria should be and proponents of such criteria might wish to consider other ways to reflect the concepts expressed that would address the concerns of supporters and opponents of specific wording.

28. There is also the question as to whether criteria for eligibility are necessary at all, since, in the view of some delegations, in elaborating rights it could be left to the scope of protection and to the exceptions and limitations to define what is ultimately to be protected.

*Beneficiaries (Article 4 of the TK text and Article 4 of the TCEs text)*

29. Clearly, there is no agreement yet on this issue. The TK text includes two alternatives while the TCEs text includes four alternatives.

30. Some delegations feel very strongly that indigenous peoples and local communities should be the sole beneficiaries, while others consider it important, noting the significant divergences in national laws and environments where TK and TCEs can be found, that flexible policy space be provided to take account of these differences. Though there appears to be broad agreement that the primary beneficiaries should be indigenous peoples and local communities, there are also divergent views regarding the possibility of recognizing other beneficiaries, such as states and nations.

31. Member States may wish to consider the necessity of giving some latitude to national law regarding the definition of beneficiaries, given the different situations regarding TK/TCEs

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<sup>4</sup> This concept is discussed notably in document WIPO/GRTKF/IC/17/INF/8 (Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore). See also document WIPO/GRTKF/IC/37/INF/7 (Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions)

holders throughout the world, which seem to be reflected in the different alternatives.

31. In my view, greater clarity is still needed in the texts as to the relationships between the distinct concepts of (i) beneficiaries, (ii) rights holders and (iii) administrators of rights (dealt with below).

*Scope of protection (tiered approach or differentiated protection) (Article 5 of the TK text and Article 5 of the TCEs text)*

32. Both the TK and TCEs texts contain three alternatives. Some of these contain elements of the so-called “tiered approach” or “differentiated protection”, whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

33. The tiered approach proposes differentiated protection along a spectrum from TK/TCEs that are available to the general public to TK/TCEs that are secret, sacred or not known outside the community and controlled by the beneficiaries.<sup>5</sup>

34. This approach suggests that exclusive economic rights could be appropriate for some forms of TK/TCEs (for instance, secret and/or sacred TK/TCEs), whereas a moral rights-based model could, for example, be appropriate for TK/TCEs that are publicly available or widely known but still attributable to specific indigenous peoples and local communities.

35. Whilst it is for the IGC to decide, I consider that the differentiated protection in the tiered approach offers an opportunity to reflect the balance referred to in the mandate of the IGC and the relationship with the public domain, as well as the rights and interests of owners and users.

36. In the TK context, the differentiated protection in the tiered approach offers an opportunity to respond to the reality of the differences among secret TK, narrowly diffused TK and widely diffused TK, which are defined in the Use of Terms section (Article 2). Member States are strongly encouraged to carefully consider what criteria are appropriate and should be used in the TCEs context, in order to determine the tiers. In doing so, consideration should be given to the practicality and legal implications of the proposed tiers. Also, it should be noted that criteria that may be relevant in the TK context may not necessarily apply in the TCEs context.

37. It is worth recalling that a tiered approach was embodied in the very first versions of the TCEs text, going back to document “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/4). The categories of TCEs in that document were: TCEs of particular spiritual or cultural value or significance; other TCEs (the remainder from the first category, so to speak), and secret TCEs. Member States are encouraged to consult this document as it also contains a commentary explaining the proposed approach on the matter of tiers.

38. Should the idea of agreeing on the inclusion of other beneficiaries (such as states or nations), but with a different scope of protection, find some support, the rights to be granted to these other beneficiaries would need to be thoroughly considered.

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<sup>5</sup> See document WIPO/GRTKF/IC/17/INF/9 (List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found).

Sanctions, remedies and exercise of rights/application (Article 6 of the TK text and Article 10 of the TCEs text)

39. The TK and TCEs texts contain several different concepts. They only share one concept (Alt 1 in the TK text and Alt 1 in the TCEs text). As this procedural provision would likely be applicable both in the TK and the TCE contexts, Member States may wish to re-look at both versions, simplify them and see where cross-pollination could improve both texts.

40. In order to simplify, Member States may wish to consider providing a general framework at the international level, leaving the details to national legislation.

Administration of rights/interests (Article 8 of the TK text and Article 6 of the TCEs text)

41. Article 8 of the TK text and Article 6 of the TCEs text deal with how and by whom rights or interests should be administered. This could include, for example, assistance with the management and enforcement of the beneficiaries' rights.

42. There appears to be no agreement on the extent of participation of TK and TCEs holders in the establishment/appointment of the authority.

43. A possible way forward for Member States to consider would be to leave flexibility at the national level to implement arrangements relating to competent authorities, rather than to attempt to establish a "one-size-fits-all" solution at the international level.

Exceptions and limitations (Article 9 of the TK text and Article 7 of the TCEs text)

44. The TK text contains three alternatives, while the TCEs text contains four alternatives. These alternatives follow two approaches:

- to leave flexibility at the national level to fully regulate exceptions and limitations (Alts 1 and 3 of the TK text and Alts 1, 2 and 3 of the TCEs text);
- to provide a framework with lists of general exceptions and specific exceptions for Member States to regulate at the national level (Alt 2 of the TK text and Alt 4 of the TCEs text). General exceptions include elements of the "classic" three-step test, reflected in the Berne Convention, 1971, and moral-rights components (concepts of acknowledgement, non-offensive use and compatibility with fair practice). Specific exceptions cover the kind of exceptions and limitations that should be included/allowed.

45. Based on the possible introduction of a tiered approach to defining the scope of protection, some delegations have asked whether the provisions on exceptions and limitations should not also follow this approach, i.e., that various degrees of excepted acts would mirror the various kinds of subject matter and the tiered rights applied to them. Member States may wish to consider this approach.

Term of protection (Article 10 of the TK text and Article 8 of the TCEs text)

46. Regarding term of protection, the TK and TCEs texts follow different approaches.

47. The wording in the TK text seems to be similar to the first paragraph of Option 1 of the TCEs text. Nonetheless, it may be worth noting that it contains a reference to Article 5 (tiered approach), while the TCEs text does not.

48. The TCEs text contains three options: Option 1 provides a term of protection related to the eligibility criteria and provides an indefinite term for moral rights; Option 2 links the term of protection to the continuous enjoyment of the scope of protection; and Option 3 is only concerned with the duration of the economic aspects of TCEs, which are limited in time. Member States may consider whether the options could be merged and whether time limits should be imposed on the periods of protection for the economic aspects of TCEs.

49. Member States may also wish to consider a similar approach in the TK text.

*Formalities (Article 11 of the TK text and Article 9 of the TCEs text)*

50. The TK and TCEs texts share a couple of paragraphs and include some additional elements.

51. The IGC could consider the tiered approach included in Article 5 in the TK and TCEs texts when discussing formalities. It might be envisaged not to establish formalities for some kinds of TK or TCEs, but to establish some formalities for other kinds of TK and TCEs. Formalities could also differ according to the type of rights to be granted. Once again, it could be recalled that the very first versions of the TCEs text referred to above had posited some form of prior registration and examination for TCEs for which the highest level of protection would be sought but not for other TCEs – see document “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/4).

*Transitional measures (Article 12 of the TK text and Article 11 of the TCEs text)*

52. Article 12.1 of the TK text and Article 11.1 of the TCEs text seem to reflect consensus that the instrument should apply to all TK/TCEs which, at the moment of entry into force, fulfill the criteria of protection. The drafting of these paragraphs is not identical in both texts. Member States may wish to examine the wording in more detail and opt for the clearer expression of where agreement lies.

53. On the question of the acquired rights of third parties, Article 12.2 of the TK text presents three options, and Article 11.2 of the TCEs text includes two options. More discussion is needed to reconcile the different views. This could be achieved by redrafting the text into a clearer and simpler expression of this important concept.

54. Member States might wish to look at both texts side by side and make the changes that they consider appropriate.

*Relationship with other international agreements (Articles 13 and 14 of the TK text and Article 12 of the TCEs text)*

55. Both texts share similar concepts. Nonetheless, the TK text includes a non-derogation clause as a separate article (Article 14) while a similar clause is included in the article on relationship with other international agreement (Article 12) in the TCEs text. Member States may wish to consider the placement of such a clause, as well as the adoption of the same wording in both texts, to avoid confusion.

*National treatment (Article 15 of the TK text and Article 13 of the TCEs text)*

56. Regarding national treatment, the TK text, which includes three alternatives, and the TCEs text differ significantly. Member States may wish to look at both texts and make appropriate changes to ensure consistency.

Transboundary cooperation (Article 16 of the TK text and Article 14 of the TCEs text)

57. This provision deals with the important issue of TK/TCEs that are shared across national borders. Although the language is more or less similar at first glance, there are some variations in terminology, which Member States might wish to pay close attention to in order to find the most suitable formulation in both texts.

58. I also note that the draft GRs text makes reference to customary laws and protocols. Member States might reflect on whether such a reference would be suitable or useful in the TK and TCEs context.

Capacity-building and awareness raising (Article 15 of the TCEs text)

59. Both the TCEs and GRs texts include provisions on capacity building and awareness raising. Member States might wish to consider including a provision on capacity building in the TK text as well, or, at least, adopt a uniform approach to this issue.

**Issues Unique and Specific to the TK Text**

Definition of “traditional knowledge” (Article 2 of the TK text)

60. While Article 3 of the TK text provides that the instrument applies to TK or that the subject matter of the instrument is TK, a definition of TK (with two alternatives) is provided for in Article 2 on Use of Terms.

61. These definitions include some elements of the eligibility criteria (see paragraphs 26 to 28 above). As already mentioned, Member States may wish to consider the appropriate place(s) to deal with the definition of TK and the criteria of eligibility to avoid repetition. I recall that a definition of TK could describe TK in general terms, whereas “eligibility criteria” refers to the features that protected TK would exhibit.

Databases and complementary/defensive protection (Article 5BIS of the TK text)

62. The draft TK and the GRs texts deal with the possibility of establishing databases and other complementary/defensive measures. It could be useful to take a look at the relevant articles in the GRs text. Member States may wish to consider the aims and objectives of such databases and their modalities of operation. Other key issues that might need to be considered include: Who should be responsible for compiling and maintaining the databases? Should there be standards to harmonize their structure and content? Who should have access to the databases? What would be their content? In what form would the content be expressed? Should there be accompanying guidelines? What would be the benefits and risks of facilitating and encouraging the development of publicly accessible databases?

Disclosure requirements (Article 7 of the TK text)

63. Proposed disclosure requirements have been extensively discussed during IGCs 35 and 36, and in previous sessions addressing the subject of GRs, noting that the GR discussions also cover “associated TK”. Member States have not yet reached a shared view on this and continue to address this question.

## Issues Unique and Specific to the TCEs Text

### Definition of “traditional cultural expressions” (Article 2 of the TCEs text)

64. It should be noted that while Article 3 of the TCEs text provides that the instrument applies to TCEs or that the subject matter of the instrument is TCEs, a definition of this term is provided for in Article 2 on Use of Terms, as in the TK text.

65. Alts 2 and 3 of Article 3 set out substantive eligibility criteria (see paragraphs 26 to 28 above) that specify which of the TCEs that fall under the definition in Article 2 would be protectable. As mentioned above, Member States may wish to consider the appropriate place(s) to deal with the definition of TCEs and criteria of eligibility to avoid repetition.

66. Examples of different forms of TCEs are included in the definition of TCEs as footnotes. Member States might wish to consider the necessity of having such examples.

### Other useful resources

67. I note that there are some useful resources available on the WIPO website which Member States may wish to use as reference materials in their preparations for IGC 37, such as:

- WIPO/GRTKF/IC/37/6, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=411448](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=411448);
- WIPO/GRTKF/IC/37/7, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=410365](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365);
- WIPO/GRTKF/IC/17/INF/8, Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=149213](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=149213);
- WIPO/GRTKF/IC/17/INF/9, List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=147152](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=147152);
- Regional, National, Local and Community Experiences, [http://www.wipo.int/tk/en/resources/tk\\_experiences.html](http://www.wipo.int/tk/en/resources/tk_experiences.html);
- Lectures and presentations on the selected topics, [http://www.wipo.int/tk/en/resources/tk\\_experiences.html#4](http://www.wipo.int/tk/en/resources/tk_experiences.html#4).

[Annex follows]

Annex

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>PREAMBLE/INTRODUCTION</p> <p><i>Recognize value</i></p> <p><i>(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;</i></p> <p><i>Promote awareness and respect</i></p> <p><i>(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;</i></p> <p>Alternative</p> <p><i>(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;</i></p> <p style="text-align: right;">[End of alternative]</p>	<p>[PRINCIPLES/PREAMBLE/INTRODUCTION]</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>5. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.</p> <p>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].</p> <p>7. [Recognizing]/[to recognize] the importance of protection, preservation and safeguarding the environment in which traditional cultural expressions are generated</p>

The Protection of Traditional Knowledge: Draft Articles	The Protection of Traditional Cultural Expressions: Draft Articles
<p align="center"><b>WIPO/GRTKF/IC/37/4</b></p>	<p align="center"><b>WIPO/GRTKF/IC/37/5</b></p>
<p><i>Promote [conservation and] preservation of traditional knowledge</i></p> <p>(iii) <i>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]];</i></p> <p><i>[Consistency with relevant international agreements and processes</i></p> <p>(iv) <i>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;]]</i></p> <p><i>[Promote access to knowledge and safeguard the public domain</i></p> <p>(v) <i>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;]</i></p> <p><i>[Document and conserve traditional knowledge</i></p> <p>(vi) <i>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;]</i></p> <p><i>[Promote human rights</i></p> <p>(vii) <i>Recognize and protect that everyone has the right freely to</i></p>	<p>and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.</p> <p>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.]</p> <p>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.]</p> <p>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.]</p> <p>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.]]</p> <p>12. [To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]</p> <p>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.]</p>

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<p><i>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.]</i></p> <p><i>Promote innovation</i></p> <p><i>(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;</i></p> <p><i>Alt</i></p> <p><i>[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;]</i></p> <p><i>Provide new rules and disciplines</i></p> <p><i>(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;]</i></p>	

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<p><i>Relationship with customary use</i></p> <p>(x) <i>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].</i></p>	
<p style="text-align: center;">[ARTICLE 1 POLICY OBJECTIVES</p> <p>Alt 1</p> <p>This instrument should aim to:</p> <p>1. Provide beneficiaries with the means to:</p> <ol style="list-style-type: none"> <li>a. prevent the [misappropriation/illegal appropriation, misuse, and unauthorized use], of their traditional knowledge;</li> <li>b. [control ways in which their traditional knowledge is used beyond the traditional and customary context;]</li> <li>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</li> <li>d. encourage and protect tradition-based creation and innovation, whether or not commercialized.</li> </ol> <p>Alternative</p> <p>(d) encourage and protect creation and innovation, whether or not commercialized.</p>	<p style="text-align: center;">[ARTICLE 1 POLICY OBJECTIVES</p> <p>Alt 1</p> <p>This instrument should aim to:</p> <p>1.1 Provide beneficiaries with the means to:</p> <ol style="list-style-type: none"> <li>(a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of their traditional cultural expressions;</li> <li>(b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary;</li> <li>(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</li> <li>(d) encourage and protect tradition-based creation and innovation.</li> </ol> <p>Option</p> <p>(d) encourage and protect creation and innovation.</p> <p>1.2 Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.</p>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>[2. Aid in the prevention of the grant of erroneous intellectual property/[patent rights] over [traditional knowledge and [[traditional knowledge] associated [with] genetic resources].]</p> <p>Alt 2</p> <p>This instrument should aim to prevent the [misuse]/[unlawful appropriation] of protected traditional knowledge and encourage creation and innovation.</p> <p>Alt 3</p> <p>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].</p> <p>Alt 4</p> <p>The objectives of this instrument are to:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(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</li> <li>(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].</li> </ul>	<p><i>Alt 2</i></p> <p>This instrument should aim to:</p> <ul style="list-style-type: none"> <li>(a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions];</li> <li>(b) encourage creation and innovation;</li> <li>(c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange;</li> <li>(d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain; and</li> <li>(e) [aid in the prevention of the erroneous grant [or assertion] of intellectual property rights over traditional cultural expressions.]</li> </ul> <p><i>Alt 3</i></p> <p>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].</p> <p><i>Alt 4</i></p> <p>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.]</p>

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<p style="text-align: center;">ARTICLE 2 USE OF TERMS</p> <p>For the purposes of this instrument:</p> <p><b>[Misappropriation</b> means</p> <p>Alt 1</p> <p>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).</p> <p>Alt 2</p> <p>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.]</p> <p>Alt 3</p> <p>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.</p>	<p style="text-align: center;">[ARTICLE 2 USE OF TERMS</p> <p>For the purposes of this instrument:</p>

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<p>Alt 4</p> <p>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.</p> <p><b>[Misuse]</b> 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.]</p> <p><b>[Protected traditional knowledge]</b> is traditional knowledge that satisfies the criteria for eligibility under Article 1 and the scope and conditions for protection under Article 3.]</p> <p><b>[Public domain]</b> 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.]</p> <p><b>[Publicly available]</b> 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.]</p> <p>[Alt 1</p>	<p><b>[Public domain]</b> 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.]</p> <p><i>Alternative</i></p> <p><b>Public domain</b> means the public domain as defined by national law.</p> <p><b>[Publicly available]</b> 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.]</p>

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<p><b>Traditional knowledge</b> 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.]</p> <p>[Alt 2</p> <p><b>Traditional knowledge</b> 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.]</p> <p><b>[Secret traditional knowledge</b> 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.]</p> <p><b>[Sacred traditional knowledge</b> is traditional knowledge that in spite of being secret, narrowly diffused, or widely diffused, constitutes part of the spiritual identity of the beneficiaries.]</p> <p><b>[Narrowly diffused traditional knowledge</b> is traditional knowledge that is shared by</p>	<p><b>Traditional cultural expression</b> means any form of [artistic and literary], [<i>other</i> creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions<sup>1</sup>, materials<sup>2</sup>, music and sound<sup>3</sup>, verbal<sup>4</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.</p> <p><i>Alternative</i></p> <p><b>Traditional cultural expressions</b> 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.</p>

<sup>1</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>2</sup> [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

<sup>3</sup> [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

<sup>4</sup> [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

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<p data-bbox="526 300 768 323" style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p> <p data-bbox="190 331 1041 384">beneficiaries amongst whom measures to keep it secret are not taken, but is not easily accessible to non-group members.]</p> <p data-bbox="190 411 1041 496"><b>[Widely diffused traditional knowledge</b> is traditional knowledge which is easily accessible by the public but is still culturally connected to its beneficiaries' social identity.]</p> <p data-bbox="190 523 1099 743"><b>[Unlawful appropriation</b> 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.]</p> <p data-bbox="190 770 1077 823"><b>[Unauthorized use</b> is use of protected traditional knowledge without the permission of the right holder.]</p> <p data-bbox="190 850 517 879"><b>[["Use"/["utilization"]</b> means</p> <ul style="list-style-type: none"> <li data-bbox="264 911 1093 963">(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: <ul style="list-style-type: none"> <li data-bbox="338 995 1077 1048">(i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or</li> <li data-bbox="338 1080 1093 1133">(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.</li> </ul> </li> <li data-bbox="264 1160 1088 1244">(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: <ul style="list-style-type: none"> <li data-bbox="338 1272 1016 1300">(i) making use of the process beyond the traditional context; or</li> </ul> </li> </ul>	<p data-bbox="1469 300 1711 323" style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>(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;</p> <p>(c) the use of traditional knowledge in non-commercial research and development; or</p> <p>(d) the use of traditional knowledge in commercial research and development.]</p>	<p><b>[[“Use”]/[“Utilization”]</b> means</p> <p>(a) where the traditional cultural expression is included in a product:</p> <p>(i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or</p> <p>(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.</p> <p>(b) where the traditional cultural expression is included in a process:</p> <p>(i) making use of the process beyond the traditional context; or</p> <p>(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</p> <p>(c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]</p>
<p style="text-align: center;">[ARTICLE 3</p> <p style="text-align: center;">SUBJECT MATTER OF THE INSTRUMENT</p> <p>Alt 1</p> <p>This instrument applies to traditional knowledge.</p> <p>Alt 2</p> <p>The subject matter of this instrument is traditional knowledge, which is knowledge that</p>	<p style="text-align: center;">[ARTICLE 3</p> <p style="text-align: center;">[ELIGIBILITY CRITERIA FOR [PROTECTION]/[SAFEGUARDING]]/[SUBJECT MATTER OF [THE INSTRUMENT]/[PROTECTION]]</p> <p>Alt 1</p> <p>This instrument applies to traditional cultural expressions.</p> <p>Alt 2</p> <p>The subject matter of [protection]/[this instrument] is traditional cultural expressions:</p>

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<p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p> <p>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.</p> <p>Alt 3</p> <p>This instrument applies to traditional knowledge.</p> <p>Criteria for Eligibility</p> <p>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.</p> <p>Alt 4</p> <p>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.]</p>	<p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p> <p>(a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities;</p> <p>(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;</p> <p>(c) that are transmitted from generation to generation, whether consecutively or not;</p> <p>(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</p> <p>(e) that are the result of creative and literary or artistic intellectual activity.</p> <p>Alt 3</p> <p>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.]</p>
<p style="text-align: center;">[ARTICLE 4 BENEFICIARIES OF PROTECTION</p> <p>Alt 1</p> <p>Beneficiaries of this instrument are indigenous [peoples] and local communities who hold protected traditional knowledge.</p> <p>Alt 2</p>	<p style="text-align: center;">[ARTICLE 4 BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]</p> <p>Alt 1</p> <p>Beneficiaries of this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.</p>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>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.]</p>	<p><i>Alt 2</i></p> <p>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.</p> <p><i>Alt 3</i></p> <p>The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.</p> <p><i>Alt 4</i></p> <p>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].]</p>
<p style="text-align: center;">[ARTICLE 5]</p> <p style="text-align: center;">SCOPE OF [AND CONDITIONS OF] PROTECTION</p> <p>[Alt 1]</p> <p>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.]</p> <p>[Alt 2]</p> <p>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</p>	<p style="text-align: center;">[ARTICLE 5]</p> <p style="text-align: center;">SCOPE OF [PROTECTION]/[SAFEGUARDING]</p> <p><i>Alt 1</i></p> <p>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.</p> <p>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.</p>

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<p>manner, and in a manner consistent with Article 14, in particular:</p> <ul style="list-style-type: none"> <li>(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: <ul style="list-style-type: none"> <li>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.</li> <li>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.</li> </ul> </li> <li>(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: <ul style="list-style-type: none"> <li>i. Beneficiaries receive a fair and equitable share of benefits arising from its use; and</li> <li>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.</li> </ul> </li> <li>(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.</li> </ul>	<p><i>Alt 2</i></p> <p>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.</p> <p>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.</p> <p>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.</p>
<p>[Alt 3]</p> <p>5.1 Where the protected traditional knowledge is secret, whether or not it is sacred, Member States [should/shall] ensure that:</p>	<p><i>Alt 3</i></p> <p><i>Option 1</i></p> <p>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:</p> <ul style="list-style-type: none"> <li>(a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to: <ul style="list-style-type: none"> <li>i. [create,] maintain, control and develop said protected traditional cultural expressions;</li> </ul> </li> </ul>

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<p>(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.</p> <p>(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.</p> <p>5.2 Where the protected traditional knowledge is narrowly diffused, whether or not it is sacred, Member States [should/shall] ensure that:</p> <p>(a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and</p> <p>(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.</p> <p>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].]</p>	<p>ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret protected traditional cultural expressions;</p> <p>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;]</p> <p>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</p> <p>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.</p> <p>(b) encourage users [to]:</p> <p>i. attribute said protected traditional cultural expressions to the beneficiaries;</p> <p>ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions]; and</p> <p>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.</p> <p>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</p>

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	<p>[to]:</p> <ul style="list-style-type: none"> <li>(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][.]</li> <li>(b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions;</li> <li>(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][.]]</li> <li>(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.]</li> </ul> <p>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:</p> <ul style="list-style-type: none"> <li>(a) attribute said protected traditional cultural expressions to the beneficiaries;</li> <li>(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;</li> <li>(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]</li> </ul>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
	<p>(d) where applicable, deposit any user fee into the fund constituted by such Member State.]</p> <p><i>Option 2</i></p> <p>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.</p> <p>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.</p> <p>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.]</p>
<p style="text-align: center;">[ARTICLE 5BIS</p> <p style="text-align: center;">[DATABASE], [COMPLEMENTARY] [AND] [DEFENSIVE] PROTECTION</p> <p style="text-align: center;">Database Protection</p> <p>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:</p> <p>5BIS.1 Publicly accessible national traditional knowledge databases for the purpose of transparency, certainty, conservation, and transboundary cooperation, and</p>	

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<p>to facilitate and encourage, as appropriate, the creation, exchange and dissemination of, and access to traditional knowledge.</p> <p>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.</p> <p>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.</p> <p style="text-align: center;">[Complementary][Defensive] Protection</p> <p>5BIS.4 [Member States]/[Contracting Parties] should [endeavour to], subject to and consistent with national and customary law:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(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;]</li> <li>(c) [provide opposition measures that will allow third parties to dispute the validity of a patent [by submitting prior art];]</li> <li>(d) encourage the development and use of voluntary codes of conduct;</li> </ul>	

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<p>(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;]</p> <p>(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;</p> <p style="padding-left: 20px;">(ii) there should be minimum standards to harmonize the structure and content of such databases;</p> <p style="padding-left: 20px;">(iii) the content of the databases should be:</p> <p style="padding-left: 40px;">a. languages that can be understood by patent examiners;</p> <p style="padding-left: 40px;">b. written and oral information regarding traditional knowledge;</p> <p style="padding-left: 40px;">c. relevant written and oral prior art related to traditional knowledge.]</p> <p>(g) [develop appropriate and adequate guidelines for the purpose of conducting search and examination of patent applications relating to traditional knowledge by patent offices;]</p> <p>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.]]</p> <p>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</p>	

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<p>traditional knowledge should only be made available to others with the prior informed consent or approval and involvement of the traditional knowledge holder.]</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.]]</p>	
<p style="text-align: center;">[ARTICLE 6</p> <p style="text-align: center;">SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION</p> <p>Alt 1</p> <p>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.</p> <p>Alt 2</p>	<p style="text-align: center;">[ARTICLE 10</p> <p style="text-align: center;">[SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]</p> <p><i>Alt 1</i></p> <p>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.</p> <p><i>Alt 2</i></p>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>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.]</p> <p>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.]</p> <p>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.]</p> <p>6.4 [Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.]</p> <p>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].]</p> <p>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.]</p> <p>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</p>	<p>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.</p> <p>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.</p> <p><i>Alt 3</i></p> <p>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.</p> <p><i>Alt 4</i></p> <p>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.]</p>

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infringement.]	
<p data-bbox="477 411 819 491" style="text-align: center;">[ARTICLE 7 DISCLOSURE REQUIREMENT</p> <p data-bbox="188 523 237 547">Alt 1</p> <p data-bbox="188 579 1077 659">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.</p> <p data-bbox="188 691 237 715">Alt 2</p> <p data-bbox="188 746 1099 938">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.]</p> <p data-bbox="188 970 1070 1050">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.]</p> <p data-bbox="188 1082 1106 1217">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.]</p> <p data-bbox="188 1249 1061 1329">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.]</p>	

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<p>Alt 3</p> <p>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.]</p> <p>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.]</p> <p>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.]</p> <p>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.]</p> <p>7.5 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has knowingly provided false or fraudulent information.]</p> <p>Alt 4</p> <p style="text-align: center;">[NO DISCLOSURE REQUIREMENT]</p> <p>Patent disclosure requirements shall not include a mandatory disclosure requirement relating to traditional knowledge unless such disclosure is material to the patentability</p>	

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criteria of novelty, inventive step or enablement.]]	
<p style="text-align: center;">[ARTICLE 8 ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]</p> <p>Alt 1</p> <p>[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].</p> <p>Alt 2</p> <p>[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].</p> <p>Alt 3</p> <p>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.]</p>	<p style="text-align: center;">[ARTICLE 6 ADMINISTRATION OF [RIGHTS]/[INTERESTS]</p> <p><i>Alt 1</i></p> <p>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.</p> <p>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.]</p> <p><i>Alt 2</i></p> <p>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].</p> <p>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.]]</p>
<p style="text-align: center;">[ARTICLE 9 EXCEPTIONS AND LIMITATIONS</p>	<p style="text-align: center;">[ARTICLE 7 EXCEPTIONS AND LIMITATIONS</p>

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<p>Alt 1</p> <p>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.</p> <p>Alt 2</p> <p>General Exceptions</p> <p>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:</p> <ul style="list-style-type: none"> <li>(a) [acknowledges the beneficiaries, where possible;]</li> <li>(b) [is not offensive or derogatory to the beneficiaries;]</li> <li>(c) [is compatible with fair practice;]</li> <li>(d) [does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and]</li> <li>(e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]</li> </ul> <p>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.]</p> <p>Specific Exceptions</p>	<p>Alt 1</p> <p>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.</p> <p>Alt 2</p> <p>In implementing this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.</p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for: <ul style="list-style-type: none"> <li>(a) learning teaching and research;</li> <li>(b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;</li> <li>(c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.</li> </ul> </li> <li>3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2).</li> <li>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</li> </ol>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>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:</p> <ul style="list-style-type: none"> <li>(a) teaching, learning, but not research resulting in profit-marking or commercial purposes;</li> <li>(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</li> <li>(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];</li> <li>(d) [the creation of an original work of authorship inspired by traditional knowledge];</li> <li>e. to exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.</li> </ul> <p>This provision, with the exception of Subparagraph (c), [should]/[shall] not apply to traditional knowledge described in Article 5(a)/5.1.]</p> <p>9.4 Regardless of whether such acts are already permitted under Paragraph 1, the following shall be permitted:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(b) the creation of an original work of authorship inspired by traditional knowledge.]</li> </ul>	<p>is protected.</p> <p><i>Alt 3</i></p> <p>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.</p> <p><i>Alt 4</i></p> <p>General Exceptions</p> <p>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:</p> <ul style="list-style-type: none"> <li>(a) [acknowledges the beneficiaries, where possible;]</li> <li>(b) [is not offensive or derogatory to the beneficiaries;]</li> <li>(c) [is compatible with fair use/dealing/practice;]</li> <li>(d) [does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and]</li> <li>(e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]</li> </ul> <p><i>Alternative</i></p> <p>7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:</p>

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<p>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:]</p> <ul style="list-style-type: none"> <li>(a) has been independently created [outside the beneficiaries' community];</li> <li>(b) [legally] derived from sources other than the beneficiary; or</li> <li>(c) is known [through lawful means] outside of the beneficiaries' community.]</li> </ul> <p>9.6 [Protected traditional knowledge shall not be deemed to have been misappropriated or misused if the protected traditional knowledge was:</p> <ul style="list-style-type: none"> <li>(a) obtained from a printed publication;</li> <li>(b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent or approval and involvement; or</li> <li>(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.]]</li> </ul> <p>9.7 [National authorities shall exclude from protection traditional knowledge that is already available without restriction to the general public.]</p> <p>Alt 3</p> <p>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.]</p>	<ul style="list-style-type: none"> <li>(a) are limited to certain special cases;</li> <li>(b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]</li> <li>(c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]</li> <li>(d) [ensure that the [use] of traditional cultural expressions: <ul style="list-style-type: none"> <li>i. is not offensive or derogatory to the beneficiaries;</li> <li>ii. acknowledges the beneficiaries, where possible;] and</li> <li>iii. [is compatible with fair practice.]]]</li> </ul> </li> </ul> <p>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.]</p> <p>Specific Exceptions</p> <p>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:</p> <ul style="list-style-type: none"> <li>(a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]</li> <li>(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;]</li> </ul>

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	<p>(c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]</p> <p>[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]</p> <p>7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:</p> <p>(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;]</p> <p>(b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]</p> <p>(c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]</p> <p>(d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]</p> <p>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].]</p>
<p style="text-align: center;">ARTICLE 10</p> <p style="text-align: center;">TERM OF PROTECTION/RIGHTS</p>	<p style="text-align: center;">[ARTICLE 8]</p> <p style="text-align: center;">[TERM OF [PROTECTION]/[SAFEGUARDING]</p>

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<p>[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].]</p>	<p><i>Option 1</i></p> <p>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.]]</p> <p>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.</p> <p><i>Option 2</i></p> <p>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.</p> <p><i>Option 3</i></p> <p>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.]]</p>
<p>ARTICLE 11</p> <p>FORMALITIES</p> <p>Alt 1</p> <p>[Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional knowledge to any formality.</p>	<p>[ARTICLE 9]</p> <p>FORMALITIES</p> <p><i>Option 1</i></p> <p>9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.</p>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>Alt 2</p> <p>[[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional knowledge.]</p> <p>Alt 3</p> <p>[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.]</p>	<p><i>Option 2</i></p> <p>9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]</p> <p>9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.</p>
<p style="text-align: center;">ARTICLE 12</p> <p style="text-align: center;">TRANSITIONAL MEASURES</p> <p>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].</p> <p><i>Optional addition</i></p> <p>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.]</p> <p><i>Alternative</i></p> <p>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</p>	<p style="text-align: center;">[ARTICLE 11]</p> <p style="text-align: center;">[TRANSITIONAL MEASURES]</p> <p>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].</p> <p>11.2 <i>Option 1</i> [[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]].</p> <p>11.2 <i>Option 2</i> 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].</p> <p>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</p>

<p style="text-align: center;"><b>The Protection of Traditional Knowledge: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/4</b></p>	<p style="text-align: center;"><b>The Protection of Traditional Cultural Expressions: Draft Articles</b></p> <p style="text-align: center;"><b>WIPO/GRTKF/IC/37/5</b></p>
<p>respect for rights previously acquired by third parties in good faith]/should be allowed to continue].</p> <p><i>Alternative</i></p> <p>12.2 [Notwithstanding Paragraph 1, [Member States]/[Contracting Parties] [should]/[shall] provide that:</p> <ul style="list-style-type: none"> <li>(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];</li> <li>(b) such right of utilization shall also, on similar conditions, be enjoyed by anyone who has made substantial preparations to utilize the traditional knowledge.</li> <li>(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.]</li> </ul>	<p>beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]</p>
<p style="text-align: center;">[ARTICLE 13</p> <p style="text-align: center;">RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS</p> <p>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.]</p> <p>[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.]</p> <p>[13.3 In case of legal conflict, the rights of the indigenous [peoples] included in the</p>	<p style="text-align: center;">[ARTICLE 12]</p> <p style="text-align: center;">[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS</p> <p>12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.]</p> <p>[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.</p> <p>12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the</p>

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aforementioned Declaration shall prevail and all interpretation shall be guided by the provisions of the said Declaration.]	aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]
<p style="text-align: center;">ARTICLE 14</p> <p style="text-align: center;">NON-DEROGATION</p> <p>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.</p>	
<p style="text-align: center;">[ARTICLE 15</p> <p style="text-align: center;">NATIONAL TREATMENT</p> <p>[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.]</p> <p><i>Alternative</i></p> <p>[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.]</p> <p style="text-align: right;"><i>[End of alternative]</i></p>	<p style="text-align: center;">[ARTICLE 13]</p> <p style="text-align: center;">[NATIONAL TREATMENT</p> <p>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].]</p> <p style="text-align: center;">[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13 NO SUCH PROVISIONS]</p>

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<p><i>Alternative</i></p> <p>[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.]</p> <p style="text-align: right;"><i>[End of alternative]</i></p>	
<p style="text-align: center;">[ARTICLE 16 TRANSBOUNDARY COOPERATION</p> <p>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].]</p>	<p style="text-align: center;">[ARTICLE 14 [TRANSBOUNDARY COOPERATION</p> <p>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].]</p>
	<p style="text-align: center;">ARTICLE 15 [CAPACITY BUILDING AND AWARENESS RAISING</p> <p>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].</p>

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	<p>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.</p> <p>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.]</p> <p>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.]</p>

[End of Annex and of Document]