

Twenty-Seventh Session of the IGC

March 24 to April 4, 2014

Traditional Knowledge and Traditional Cultural Expressions:

Certain suggested cross-cutting issues –

Non-Paper prepared by the IGC Chair, His Excellency, Ambassador Wayne McCook

BACKGROUND

1. In October 2013, the General Assembly agreed that the IGC should “[...] continue to expedite its work with open and full engagement, on text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.”

2. In keeping with the mandate of the IGC for the 2014-2015 biennium, the goal of the traditional knowledge (TK) and traditional cultural expressions (TCEs) negotiations is to find, through considering the relevant subject matter, an appropriate intellectual property (IP)-based agreement/s for the protection of TK and TCEs.¹

3. In view of the IP focus of the IGC’s work, “protection” refers to the protection of human intellectual creativity and innovation inherent in TK and in TCEs against unauthorized use or inequitable exploitation; protection is typically effected by way of exclusive rights (roughly analogous to “free, prior and informed consent”) that allow controlling the protected subject matter and excluding others from using it. IP protection also includes moral rights, protection against unfair competition and rights to an equitable compensation.

4. IP protection is distinct from preservation, safeguarding and promotion of cultural heritage, which refer generally to the identification, documentation, transmission and revitalization of cultural heritage in order to ensure its maintenance and viability. IP protection is also distinct from the framework provided by instruments dealing with TK associated with genetic resources (GRs) or TK relevant to plant GRs for food and agriculture. International instruments outside of WIPO and beyond IP deal with those aspects within their specific policy contexts. For example:

- UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, 1989;
- UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003;
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005;
- United Nations Declaration on the Rights of Indigenous Peoples, 2007;
- Convention on Biological Diversity, 1992;
- FAO International Treaty on Plant Genetic Resources for Food and Agriculture, 2001; and
- Nagoya Protocol on Access to GRs and the Fair and Equitable Sharing of Benefits arising from their Utilization, 2010.

¹ It is worth noting the information provided in the “Gap Analyses” (documents WIPO/GRTKF/IC/13/4(b) and 13/5(b)). Prepared for the IGC in 2008, the Gap Analyses identified the gaps that existed at the international level with respect to the protection of TCEs and TK, set out considerations relevant to determining whether those gaps needed to be addressed, and described options to address any gaps. These documents also analyzed the concept of “protection”.

5. Despite the fact that a number of international instruments deal with TK, it seems clear that none of those instruments provide, in legal terms, for the effective protection of TK from an IP perspective.

6. In contrast, there has been work undertaken at the international level on TCEs (in which the term “expressions of folklore” was and still is sometimes used). In fact, the international protection of TCEs has received attention since the 1960s.² For example:

- Article 15.4 of the Berne Convention, 1967 (this article was added to the Convention to enable the protection of unpublished works of unknown authors; it was intended to enable protection of “expressions of folklore”);
- Tunis Model Law on Copyright, 1976 (which contains sui generis provisions for the legal protection of TCEs); and,
- WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1982 (providing a sui generis model of protection).³

7. In addition, performances of TCEs may come under international related rights protection, as provided by the WIPO Performances and Phonograms Treaty (WPPT, 1996) and the Beijing Treaty on Audiovisual Performances (2012).⁴

8. Furthermore, contemporary versions of TCEs are protectable as copyright works or industrial designs; recordings of TCEs are protected under related rights; and, the reputation and goodwill associated with TCEs can be protected through the use of distinctive signs (such as certification and collective trademarks, appellations of origin and geographical indications).

9. However, while international instruments provide pockets of protection for TCEs and adaptations thereof, to some degree, within the existing IP system, there is no comprehensive international legal protection system for TCEs as such.

10. Similarly, TK “as such” remains mainly unprotected, while TK-based innovations and creations can be covered, to some degree at least, by existing IP protection. For instance, an invention developed using TK is entitled to patent protection, provided that it meets the patentability criteria.

11. Quite a number of Member States have adopted special (“*sui generis*”) national legislation or measures for the protection of TCEs, and some, but not many, have adopted special national legislation for the protection of TK. A few regional organizations have adopted or are developing regional instruments.⁵ However, these national and regional instruments are diverse and experiences with their implementation are varied. In any event, national and even regional protection of TK and TCEs does not seem to be enough to ensure their effective protection, especially as they are often exploited in jurisdictions other than from where they originate. Therefore, there is a call for an international instrument to provide for the effective protection of TCEs and TK “as such” (positive and/or defensive protection), as well as for the protection of community interests in respect of contemporary versions of TCEs and of TK-based innovations (defensive protection).

² See WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, 2003.

³ The Model Provisions have been reasonably widely used. See WIPO, Final Report on National Experiences with the Legal Protection of Expressions of Folklore (WIPO/GRTKF/IC/3/10).

⁴ In short, these treaties provide that performers of expressions of folklore are entitled to the same moral and economic rights as other performers, including rights of reproduction, distribution, rental and making available.

⁵ The WIPO website contains a database of TK and TCEs laws (<http://www.wipo.int/tk/en/databases/tklaws/>).

12. Taking into account existing forms of protection, the “gap” that the IGC seeks to fill at the international level is the clarification of which rights, measures and mechanisms for the IP-like protection of TK and TCEs might be necessary and appropriate, together with the development of the mandated instrument(s) to address them.

13. As one delegation has put it, it would be helpful to winnow down the current rather lengthy and detailed texts to concisely-stated core principles and obligations. At the international level, a simple, direct and efficient text(s) could be aimed at (“leaner, meaner, cleaner”, in the words of a delegation). This may facilitate reaching agreement in the IGC. A discussion of cross-cutting issues might assist in such an exercise.

14. In doing so, consideration should be given to a determination of which IP-related objectives would be appropriate for such an instrument (see paragraph 80 below). What is the harm that an IP instrument on TK or TCEs would seek to address? What is the specific need that all can agree on deserves an international solution? What gaps currently exist that ought, from a policy perspective, to be filled? Equally, clarity is needed on how the instrument should deal with the core issues of defining the subject matter, identifying the beneficiaries, framing the scope of rights and delimiting those rights through appropriate exceptions and limitations. There should be a direct correlation between the objectives of protection and the substantive provisions and the appropriate time to discuss objectives needs to be determined.

CROSS-CUTTING ISSUES WHICH COULD BE CONSIDERED BY IGC 27

15. The IGC has previously identified four key policy issues that the IGC has agreed warrant prioritized attention: subject matter of protection, beneficiaries, scope of protection and exceptions and limitations.

16. In the past, the IGC has considered these policy issues separately, but in parallel, in relation to TK and TCEs. Given the similarities between the TK and TCEs draft articles, for the first time, the WIPO General Assembly has mandated a consideration of “cross-cutting TK/TCE issues”.

17. I wish to draw attention to some of the fundamental cross-cutting issues that remain unresolved, and impede further progress in the text-based negotiations of the IGC. In my view, it will be difficult to advance on the drafting of the TK and/or TCEs draft articles without resolving, or at least reaching greater clarity on, these fundamental cross-cutting issues. Some of the issues I propose cut across both the TK and TCEs texts (horizontal cross-cutting) and/or pervade two or more articles of at least one of the texts (vertical cross-cutting). Further, the cross-cutting discussion at IGC 27 might also facilitate a more direct and interactive comparison between the two texts, so that, for example, the IGC might agree that a provision, wording or language in the TK text should be copied across from the TCEs text, and vice versa.

18. The four cross-cutting issues I have identified are the following:

- (1) the meaning of “traditional”;
- (2) the beneficiaries of protection, in particular, the role of states or “national entities”;
- (3) the nature of the rights, including the meanings of “misappropriation” and “misuse”; and
- (4) the treatment of publicly available and/or widely diffused TK and TCEs.

19. This list is not necessarily authoritative and is certainly not fixed or closed, as delegations may want to propose some other cross-cutting issues for discussion. I propose this list simply as a starting point for the discussion.

20. For each of the issues I have identified, I also present, where possible, their implications, the main approaches to them, and I try to point to the options available for their treatment.

21. As an Annex, I have prepared a table which sets in two parallel columns the texts of the draft articles on TK and on TCEs, listed by issue, for ease of comparison. I hope this will be a useful tool to help delegations compare the texts and identify cross-cutting areas of convergence. The table might also assist delegations to identify particular provisions, wording or language from one text that they suggest be used in the other text.

22. In addition to the four “main” cross-cutting issues as I see them, and as discussed in further detail below, many other cross-cutting issues are to be found in all the articles, and I list them further below under “Other issues”.

MAIN CROSS-CUTTING ISSUES

1 – The meaning of “traditional”

23. The meaning of “traditional” requires further clarification. This is a key, cross-cutting question, especially because original “contemporary” cultural expressions, including those with “traditional” origins, are protectable by copyright and TK-based innovations may benefit from patent protection if they meet patentability criteria.

24. Visibly, there are a range of different views on this question and a proper articulation of Article 1 “Subject Matter of Protection” in both texts would bring clarity on the meaning of that term. I am of course aware that the characteristics of TK and TCEs throughout the world vary greatly, hence the importance of identifying those high-level and universal characteristics that belong in an international instrument.

25. In defining what is meant by the term “traditional”, the IGC might wish to examine its sub-components and, in particular, how best to articulate: the intergenerational nature of transmission; the link between the TK and TCEs and the originating culture and community; the collective nature of TK and TCEs; and their dynamic and evolving nature.

26. This means that the meaning of the term “traditional” may be explicated in the definition itself, as well as in the eligibility criteria. As concerns TCEs, there is currently no agreement on whether the definition of TCEs and eligibility criteria should form one single paragraph or be laid out in two separate paragraphs. The IGC could consider opting for one or the other.

27. With regards to the concept of transmission “from generation to generation and between generations”, some argue that “from generation to generation” does not take into account cases where one or more generations are skipped (TK or TCEs being transmitted from grand-parents to grand-children, for example). Some delegations have proposed the term “intergenerational”: could the IGC agree to this concept to cover all instances of transmission across the generations?

28. When I referred earlier to the “link with the originating culture and community”, I had in mind the discussion around the wording addressing the relationship between TCEs and traditional culture (i.e. “embodied”; “indicative”). Indeed, there are divergences of views on the terms used to express the link between the TCEs and the traditional culture of which they are part. This question arises too when dealing with the link between TCEs and their beneficiaries.

I point to the discussion over the preferred use of the terms “distinctive of”; “distinctive to”; “the unique product of”; “associated with” to connect the TCEs with the beneficiaries.

29. In the TK text, the impact of the inclusion or exclusion of the term “distinctively” in combination with “associated/linked with the cultural, [and] social identity, [and] or cultural heritage of beneficiaries”, in paragraph 1.3, needs further reflection along those lines. Some consider that the inclusion of that term would make it more difficult to assess whether a particular TK is eligible for protection or not. Others claim that the inclusion of that term would appropriately narrow the scope of the TK to be protected. Thus, we see that the cross-cutting issue of “traditional” is relevant to the definition of subject matter and to beneficiaries.

30. A further issue, which arises in the TK text, regards the inclusion of a reference to the term during which TK should have been “used” to be considered eligible for protection: “and has been used for a term as may be determined [...] but of no less than [fifty years].” Some claim that an objective time parameter is necessary, since the term “traditional” could be understood differently in diverse cultures and nations. However, it is not clear if this proposal contradicts a characterization of TK as “dynamic and evolving”.

31. In more general terms, one view is that the definition should be broad enough to cover all kinds of TK and TCEs, while another view is that the definition should be precise and limited for clarity and transparency purposes. If the definition is broad, then other elements, such as the criteria for eligibility and/or the exceptions and limitations, would probably need to act as a limiting filter, otherwise, this would have an impact on the scope of protection (the extent of the rights), which may need to be more limited, in order to reach agreement. Thus, there is interplay between the key issues of definition of subject matter, scope of rights and exceptions and limitations. This interplay may relate also to the balance that is inherent in all types of IP protection systems (and that underlies all four cross-cutting issues), i.e. the balance between private rights and public interests.

32. Lastly, the wording in Article 1(3) of the TCE text may offer a useful addition to the TK text regarding the choice of terminology.

2 – Nations or states as beneficiaries of protection

33. The determination of the beneficiaries is a cross-cutting issue that is under consideration under both themes. The IGC might wish to address it within both texts in a coherent manner.

34. First, I use the term “beneficiaries” here to refer to the persons (legal or natural) who would be identified as the rights holders under national or domestic legislation implementing an international instrument as might be agreed upon by the IGC.

35. This should be distinguished from an entity (such as a “competent authority”) that might be tasked under national law with exercising rights in cases where the beneficiaries cannot be identified (which we could perhaps refer to as “orphan TK” and “orphan TCEs”). Paragraph 2.2 in the TK text and paragraph 2 of Option 1 in the TCE text leave to national legislation the option of considering a national entity as beneficiary, when the TK or TCE is not specifically attributable or confined to an indigenous or local community, and/or it is not possible to identify the community that generated them. A national entity might also play a role where the beneficiaries seek assistance with the management and enforcement of their rights. These “national entities” are not, in my mind, “beneficiaries” as such, and are dealt with in the articles in the two texts dealing with the administration and management of rights.

36. There is also another kind of “beneficiary”, namely a more general class of persons who may benefit from the provisions as may be agreed upon by the IGC. These are not the direct beneficiaries in the sense that they acquire specific rights under the provisions, but they may

be said to “benefit”: for example, “society at large” might benefit from the provisions in an indirect way. This notion, in my view, could be better reflected in preambular language, rather than in an article headed “beneficiaries”.

37. There seems to be an understanding on the principle that the beneficiaries of protection (in the sense of “rights holders”) in both texts are the indigenous peoples and local communities. Of course, on terminology, there remain divergences on the use of the terms “peoples” and “local communities”. I have already asked certain delegations to conduct informal consultations on these questions, and we can revert to these again later.

38. There are still, however, varied views on the extent to which the instrument should extend beyond indigenous peoples or local communities to include other potential beneficiaries, whether determined or defined by an international instrument(s) or by national and/or domestic legislation, such as “nations”.

39. Indeed, one view is that indigenous peoples and local communities should be recognized as sole beneficiaries. This view exposes the concern that protection could be extended too widely to any kind of knowledge or cultural expression, since those would not need to be related to an indigenous or local community (see the discussion on the “link” with the community, above).

40. Another view is that nations should be considered as beneficiaries, since, in some cases, Member States do not have specific segments of the population that can be identified as indigenous peoples or local communities.

41. The term “nations” can have different meanings depending on context: it could refer to either an indigenous people (such as First Nations in North America), or the population of an entire country, in a sense a near synonym for “state”. Considering states as beneficiaries could take into account those situations where there are TK or TCEs which are not affiliated to an indigenous people or local community in a given jurisdiction.

42. As mentioned above, in paragraph 35, there is the proposal that a “national entity” could be considered a beneficiary where it is not possible to identify the indigenous people or local community that generated the TK or TCEs, or where the TK/TCE is not specifically attributable to certain indigenous people/peoples or local community/communities. The IGC needs to address the question of nations or states standing in the shoes of indigenous peoples or local communities as the direct holders of rights in TK/TCEs, as opposed to nations or states simply exercising, managing, administering or enforcing rights on behalf of indigenous peoples or local communities.

43. In any case, I believe this issue needs to be revisited, to make clear in which circumstances a nation/state or a national entity could be considered as a beneficiary. To reach agreement, it might be advisable to leave this as an option to be taken at the national level, according to the national situation. I would invite delegations to look carefully at paragraph 1 of Option 2 in the TCE text, which could provide a pragmatic and concise solution to this issue by recognizing indigenous peoples and local communities as beneficiaries, while leaving the door open for Member States that might wish to identify nations or states as beneficiaries at the national level.

44. The identification of beneficiaries is inherently linked to the definition of subject matter laid out in Article 1 of the TK and TCE texts (see above). Generally, many delegations have noted the overlaps and redundancies between Articles 1 and 2 in both texts, and many have pointed to the various linkages between those two articles.

45. For example, some wish to include the phrase “who hold, maintain, use or develop” in the definition of beneficiaries, as in paragraph 2.1 in the TK text and paragraph 1 of Option 1 of the TCE text in order to clearly circumscribe the potential beneficiaries. In contrast, others deem this redundant, because the relationship between the TK or TCE and the beneficiary is already characterized in paragraph 1.3 of the TK text and in paragraph 2(c) of Option 1 and paragraph 1(c) of Option 2 of the TCE text. It is suggested that the IGC consider cross-referencing between Articles 1 and 2 to avoid duplication and inconsistency in the text. Divergences of views around the meaning of those terms “hold, maintain, use or develop” may be contributing to the lack of agreement, which links back, in some respects, to the meaning of “traditional” (see above).

3 – The nature of the rights

46. The cross-cutting issue that I have identified here concerns the nature of the rights that will be afforded to the beneficiaries (rights holders).

47. The TK and TCE texts use the terms “misappropriation” and/or “misuse”; however, these terms are not defined in these draft instruments and their precise legal meaning is not settled within the IGC. On the one hand, these terms could be used in a non-technical manner, conveniently and loosely embracing the various prohibited acts more specifically detailed in the operative draft articles of the texts.

48. On the other hand, the term “misappropriation” has a known, technical meaning. Black’s Law Dictionary defines it as “the common-law tort of using the non-copyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization, or copying a work whose creator has not yet claimed or been granted exclusive rights in the work. [...] The elements of misappropriation are: (1) the plaintiff must have invested time, money, or effort to extract the information, (2) the defendant must have taken the information with no similar investment, and (3) the plaintiff must have suffered a competitive injury because of the taking.” The tort of misappropriation is part of unfair competition law in the common law system. Misappropriation thus entails the wrongful or dishonest use or borrowing of someone’s property, and is often used to found action in cases where no property right as such has been infringed. Misappropriation may refer to wrongful borrowing or to the fraudulent appropriation of funds or property entrusted to someone’s care but actually owned by someone else.

49. I also recall that the latest draft of the GRs text, as developed at IGC 26, carries two definitions of misappropriation, reading as follows:

Option 1

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

Option 2

[“Misappropriation” is the use of genetic resources, [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources] of another where the genetic resources or traditional knowledge has been acquired by the user from the holder through improper means or a breach of

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

50. The term “misuse”, similarly, could be used in a colloquial manner to cover cases of illicit or wrongful uses, albeit it also has a technical meaning: in the field of patents, Black’s Law Dictionary defines it as “the use of a patent either to improperly extend the granted monopoly to non-patented goods or to violate antitrust laws.” In general, Black’s Law Dictionary states that “misuse” is “improper use, in an unintended or unforeseeable manner.” Dictionaries generally define misuse as a wrong, incorrect or improper use, or misapplication. Misuse may also refer to improper or excessive use, or to acts which change the inherent purpose or function of something.

51. For the purposes of this non-paper, I do not delve into this aspect further at this stage, and turn now to the specific rights which are set out in the operative draft articles. These articles seek to answer the question of which specific acts in respect of protected TK and/or TCEs ought to be prohibited or prevented. This, in my view, is a determination of the kinds of acts which would be considered acts of “misappropriation” or “misuse”. While terms such as “misappropriation” and “misuse” are convenient and might remain in the objectives and preamble of the instrument(s), should there be any, the real inquiry in my view is to determine which are the specific rights that would be associated with protected TK and TCEs.

52. In this regard, the current draft articles evidence a number of policy choices that Member States should consider and make.

53. The two main options are, to put it plainly, “the right to say no” option and “the right to be compensated” option.

54. The first option would follow the model of exclusive rights, where rights holders have a bundle of rights which they own and can transfer or waive, as the case may be. Under this approach, rights holders have a set of rights which they can enforce against third parties. They, therefore, have the possibility to say “no” to uses that fall within their exclusive prerogatives. This is why I call this option “the right to say no”. This is the character of the exclusive economic rights provided for by patent and copyright laws. For example, under copyright law, the author or rights owner has the exclusive right to authorize or prohibit certain acts in relation to a work. This right is said to be exclusive, because only he or she can decide whether to carry out or authorize others to carry out those specified acts.

55. Such an exclusive right could be seen as analogous to a right of free, prior and informed consent, as referred to in the Convention on Biological Diversity, for example. Indeed, both envisage the possibility to “say no”.

56. The second option is a right to remuneration or compensation. Stated otherwise, it is the right to be paid for certain uses, without the possibility to prevent or oppose those uses. This option is related to what has been described in literature as a “compensatory liability regime”. Existing intellectual property systems include this option. Indeed the possibilities for compulsory licenses in copyright and patent law might be seen as instances of a right to compensation without a corresponding right to say no.

57. To give an example, in some national copyright systems, there are compulsory licensing arrangements for certain public uses of musical works. Article 11bis(2) and Article 13(1) of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) provide the implementation framework on compulsory licensing in the field of copyright. They state that when compulsory licenses are applied, they must not prejudice the author's right to fair compensation.

58. On a different level, a distinction must be made between economic rights and moral rights. Under copyright, economic rights allow the rights owner to derive financial reward from the use of his or her works by others. Exclusive economic rights would cover the following acts in relation to a work:

- its reproduction in various forms, such as printed publication or sound recording;
- its public performance, such as in a play or musical work;
- its recording ("fixation"), for example, in the form of compact discs or DVDs;
- its broadcasting, by radio, cable or satellite;
- its translation into other languages; and
- its adaptation, such as a novel into a film screenplay.

59. Moral rights are better known as part of the copyright model, and are enshrined in Article 6bis of the Berne Convention. Moral rights refer, in short, to the right to claim authorship of a work (the right of attribution) and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honor or reputation (the right of integrity).

60. Both the TK and TCE texts include economic and moral rights options. In the TK text, economic rights can be found in paragraph 3.1 of Option 1, while moral rights can be found in paragraph 3.2 of Option 1 and in paragraph 3.1(b)(i) of Option 2. In the TCE text, economic rights can be found in Option 2 (a) and (b) and moral rights in Option 2 (c), (d) and (e). To explore the implications of this distinction, let me refer to the discussion in the TK arena. Some have suggested that exclusive economic rights could be appropriate for some forms of TK (for instance, for sacred and secret TK, and TK uniquely attributable to specific indigenous peoples and local communities), whereas a moral rights-based model could be appropriate for TK that is secular and already publicly available or not attributable to specific indigenous peoples and local communities. Similarly, on TCEs, it has been proffered that TCEs, which are secret and/or of particular cultural or spiritual significance could be protected by economic rights, whereas all other TCEs could be adequately protected by a moral rights-inspired regime.

61. A further option, which in the TCE text is loosely associated with moral rights, is protection against passing off, that is, protection against a use that is likely to mislead the public as to the origin of the TK or TCE in question. This approach, typically based on an unfair competition model, has been discussed before by the IGC (for example, see Norway's proposal made at the IGC's ninth session (WIPO/GRTKF/IC/9/12)).

62. All of the options laid out above are not mutually exclusive. I could see how some of them could be appropriate in certain cases, while others could be more adequate in other, different cases. This is for the IGC to decide, but I wish to draw attention to the fact that the selection of options could affect the balance that many delegations refer to. This relates to how the "public domain" is conceived of, and shaped, in relation to TK and TCEs protection (this touches upon yet another cross-cutting issue which is addressed below). Furthermore, which options are appropriate may depend on whether one is referring to TK or TCEs; the nature of the TK and the TCEs; and, the uses to which the TK and TCEs would be put. In regard to the nature of the TK, I recall document WIPO/GRTKF/IC/17/INF/9 ("List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found"), which identifies the various forms in which TK may be found. In this regard, the selection of the

rights model would depend on, for example, whether TK has already been disclosed or not, is directly controlled by indigenous and local communities or is no longer in the control of indigenous and local communities.

63. The texts contain a further dual-option approach: rights-based and measures-based approaches. In the TK text, there is what can be broadly characterized as an exclusive rights-based approach (Option 1) and a measures-based approach (Option 2); in the TCE text, it seems to me that Option 1 would be qualified as measures-based, and Option 2 as rights-based. Some consider that these options (rights-based and measures-based) should be considered as complementary and could be combined, while others view them as exclusive of one another.

64. In the rights-based approach, the beneficiaries would be granted rights which they can manage and enforce; in the measures-based approach, States are enjoined only to provide “measures” for the protection of TK, which could include a wide range of legal and practical, civil and criminal options. The measures-based approach is not unfamiliar in international IP law. For example, Article 2 of the Satellite Convention, 1974, requires Contracting States to “take adequate measures to prevent” unauthorized distribution of program-carrying signals. Proponents of the measures-based approach point to the flexibility it affords in implementing the instrument at the national level, and argue that the exclusive-rights based approach would leave little to be regulated at the national level in terms of the scope of protection.

65. The IGC could also discuss the level of detail into which the international instrument should delve, and the point at which national law would take over. Indeed, there are here, again, two approaches: one is to give States maximum flexibility to determine the scope of protection through national and domestic implementing legislation and other measures; the other is to be more detailed and prescriptive at the international level to ensure maximum harmonization. This lies at the heart of the IGC’s discussions on a text for an international instrument and goes back to one of the questions raised at the Ambassadorial segment that took place at IGC 26, namely which issues need to be addressed at the international level, and which can be left to be dealt with at the national level.

66. Finally, there are “positive” and “defensive” approaches to the protection of TK and TCEs. These two approaches have been discussed in detail before. These are also not mutually-exclusive options.

4 – “Publicly available/widely diffused” TK and TCEs and the concept of the “public domain”

67. One challenge facing the IGC is the treatment of TK or TCEs that are already publicly available and/or widely diffused. I use these terms to refer to TK and TCEs that are already available, without restriction, to the general public. The policy issue is whether there should be differentiated protection for publicly available TK or TCEs, on the one hand, and secret or access- and use-restricted TK or TCEs, on the other, recognizing that TK and TCEs come in many diverse forms and how, by whom, where and why they are used differ. This is a cross-cutting issue because it is relevant to the definition of the subject matter, the identification of the beneficiaries, the delimitation of the scope of rights and the extent of the exceptions and limitations to the rights. In my view, the separate issue of TK/TCEs that are shared across cultures and territories is rather dealt with under articles dealing with transboundary protection.

68. In the TK text, references to this issue can be found in:

- Paragraph 1.4: [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, [for a reasonable period of time], in the public domain, protected by an intellectual property right or the

application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.] (in the criteria for eligibility)

- Option 2, paragraph 3.1(b): “Where [protected] traditional knowledge is knowingly used outside the traditional context” / “where the traditional knowledge [is secret]/[is not widely known,]” (in the scope of protection)

- Paragraph 6.11: National authorities shall exclude from protection traditional knowledge that is already available without restriction to the general public.] (in the Exceptions and Limitations).

69. One view is to distinguish between secret TK and publicly available/widely diffused TK, or TK that is widely known or used outside the community, so that the latter continues to be freely available, but *how* it is used is regulated by moral rights. This would imply that the protection granted to publicly available/widely diffused TK is milder, and does not restrict the public domain in the same way that exclusive economic rights would. Following this view, the current draft of the TK text (see Option 2 paragraph 3.1(b) and paragraph 6.11, referred to above) seems to establish different levels of protection and a special set of rights according to the character of the TK and based on how, by whom, why and where it is used.

70. Another view is not to distinguish between secret TK and between publicly available/widely diffused TK, especially TK that did not become publicly available or widely diffused with the consent of the holders. Whether in such a situation the protection considered would encompass all rights including exclusive rights or be of a milder form needs to be given careful consideration.

71. These views beg the question - should all TK be protected? Should all TK be equally protected? Some degree of agreement needs to be reached on this cross-cutting issue, for whatever is decided regarding this issue on this article will have an impact on other articles, such as beneficiaries, scope of rights, exceptions and limitations, among others.

72. Given the choices to be made on this issue, and their significant implications, careful consideration could be given to the option of establishing different levels of protection, according to the characteristics of TK and by whom, how, why and where it is used. Besides, some reflection is needed on the practical questions of who would grant prior informed consent or be involved in the establishment of mutually agreed terms when TK is shared by different indigenous peoples and local communities.

73. More broadly, this issue, in turn, links to understandings of the concept of the “public domain”, and related concepts such as “prior art”, as discussed 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). The broader the protection for TK and TCEs, the less room is left for the public domain.

74. This issue centers on the fundamental balance that the IP system is based upon. Exclusive rights are balanced against the interests of users and the general public, with the intent to foster, stimulate and reward innovation and creativity (see paragraph 31 above).

75. Bearing in mind this element at the basis of any IP instrument, how are the TK and TCE texts to address the relationship with the public domain, which is one of the mechanisms to achieve the balance in IP systems? Some argue that the public domain is essential to give rise to further creativity and that without a rich and robust public domain, creativity could be stifled. Some argue that the scope of protection of TK and TCEs should be limited in order not to encroach on the public domain.

76. In contrast, some reject the notion of a “public domain” as foreign to the customary laws of indigenous peoples and local communities. They contend that the protection of TK and TCEs overrides the concerns about the public domain, and that protection against misappropriation and misuse is essential. Resolving this issue will be important for making progress in our negotiations.

OTHER ISSUES TO BE CONSIDERED BY IGC 27

77. These other issues are only touched upon briefly, even though they also require cross-cutting consideration.

Objectives and Principles

78. With respect to the Objectives and Principles/Objectives/Preamble, the IGC could reflect on which ones are most directly related to IP, as the mandate of the IGC is to find an appropriate IP-like agreement/s for the protection of TCEs and TK, at the international level, at WIPO. The IGC could thus consider streamlining the text to avoid redundancies and place focus on IP-related objectives. Similar issues arise in the TCEs and TK context, and the IGC might wish to add this area to the cross-cutting issues discussion. Some delegations have suggested that a single set of objectives be developed for both TK and TCEs. A delegation has also drawn attention to the difference between the objective(s) of the instrument, on the one hand, and the objective(s) of TK/TCE protection, on the other.

79. The TK text, for example, includes more than 20 Policy Objectives. Narrowing down the number of objectives could bring clarity to the process and facilitate further progress (see paragraph 14 above). This could be done by avoiding repetition of ideas, identifying the IP-related policy objectives that need to be dealt with at an international level, at WIPO, and transferring to other sections paragraphs that contain operative language (mechanisms as opposed to objectives).

80. For example, in the TK text, certain Policy Objectives are most directly related to IP (the text below is exactly as the Objectives currently appear in the text), including:

- [Repress] Prevent [unfair and inequitable uses] misappropriation and misuse;
- Promote innovation and creativity;
- Ensure prior informed consent and exchanges based on mutually agreed terms
- Promote mandatory disclosure requirement;
- Ensure that TK is compiled in databases that are available to patent examiners, except when the TK is secret TK;
- Preclude the grant of [improper] IP rights to unauthorized parties;
- Utilization of traditional knowledge by third parties; and
- Promote access to knowledge and safeguard the public domain.

81. The Policy Objectives in the most recent GRs text (Consolidated Document Relating to Intellectual Property and Genetic Resources - Rev. 2) could be a good basis for redrafting the Policy Objectives in the TK text. Following this example, to prevent / to contribute to the prevention of misappropriation and misuse of TK could become the objective of this instrument. Some of the other objectives could be removed or moved elsewhere, and others could be included in a subset of objectives dealing with how the main objective would be pursued.

82. Regarding the General Guiding Principles found in the text, they could be narrowed down. Several could be merged with the Objectives, and others could be removed (not being relevant or useful enough). It is worth noting that the GRs text does not include a section on Principles but rather a Preamble.

Sanctions, Remedies and Exercise of Rights / Application (Article 4 of the TK text and Article 8 of the TCE text)

83. In the TK text, there seems to be a widely-held view that only a general framework would need to be established at an international level, leaving the details to national legislation.

84. Article 8 of the TCE text contains two options. There seems to be agreement that redress should be determined at the national level: Option 1 provides states with the flexibility to determine appropriate sanctions based on national law and Option 2 is more prescriptive and provides sanctions in case of infringements of TCEs. The IGC could reflect on ways of merging Options 1 and 2. Furthermore, I can see value in trying to reach agreement on whether states should be obliged to provide parties to a dispute the possibility to use alternative dispute resolution mechanisms.

Administration of Rights/Interests (Article 5 and *5bis* of the TK text and Article 4 of the TCE text)

85. In the TK text, the two alternatives of Article 5.1 seem to deal with different issues, and the second alternative refers rather to the scope of protection (see above). The first alternative of Article 5.1 and Article *5bis* are true alternatives, and it would be helpful to focus the discussions on a single merged text.

86. Article 4 of the TCE text contains two options. In both, there seems to be agreement that the administration should only occur at the request of the beneficiaries. Option 1 is detailed and prescriptive, while Option 2 is short and flexible. In fact, in my view, Option 2 represents the kind of concise formulation that could be suitable for an international instrument.

Exceptions and Limitations (Article 6 of the TK text and Article 5 of the TCE text)

87. In the TK text, Article 6 currently includes the conditions to be fulfilled to establish limitations and exceptions under national law (paragraph 6.2), as well as a number of specific exceptions. There are diverging views regarding these issues. Given the different views on this issue, a compromise might be found if some minimum conditions are established for the adoption of exceptions and limitations and if latitude is left to define exceptions and limitations at a national level. Some consider that strong exceptions and limitations are needed to achieve a balance to protect the interests of the holders of TK and the society at large.

88. In the TCE text, there appears to be agreement on exceptions and limitations concerning respect for customary use as well as relating to cultural institutions. However, there remains disagreement on the relevance of existing exceptions under conventional copyright and trademark law as well as on the possibility to create works inspired by or borrowed from TCEs. One view is that acts that are currently permitted as part of exceptions and limitations under existing IP law should continue to be permitted and should not be affected by TCE protection. Another view is that protection of TCEs should override current IP protection, even in cases where acts are currently permitted under exceptions and limitations. I would like to encourage discussions aimed at reconciling both views.

89. There are also diverging views on the articulation of a test that Member States would apply when developing exceptions under national law (paragraph 3). The current text merges elements of the three-step test with concepts of acknowledgement, non-offensive use and compatibility with fair practice. Some argue that the test should be the “classic” three-step test, thereby being consistent with other fields of IP, while others see the test as needing a moral-rights component (see discussion above on the cross-cutting issue of the nature of the

rights). Again, this goes back to the question of which issues need to be addressed at the international level, and which can be left to be dealt with at the national level.

90. The IGC could also consider the reference to “free, prior and informed consent” (FPIC) in paragraph 4. Some are of the view that a reference to FPIC in Article 5 defeats the purpose of allowing certain uses that would otherwise encroach on the scope of protection. Others maintain that no uses should ever take place without the FPIC of the beneficiaries. Perhaps this is a concept which could be discussed under Article 3 (“Scope of protection”) instead, and I would like to call upon the IGC to address this when considering the cross-cutting issue of the nature of the rights (issue 3).

Term of Protection (Article 7 of the TK text and Article 6 of the TCE text)

91. In the TK text, two broad approaches are included in this Article: the protection should last as long as the TK fulfills/satisfies the criteria of eligibility (Option 1), and the duration of protection should vary upon the characteristics and value of TK (Option 2). Negotiations on Articles 1 and 3 might have an impact on this article. For instance, it might be envisaged to grant a longer term of protection for secret TK.

92. Article 6 of the TCE text includes a distinction based on the moral (indefinite protection) and economic aspects of TCEs (protection limited in time), that might be applicable to TK, at least to a certain extent. The article contains two options: the first provides a term of protection related to the eligibility criteria in Article 1 and provides an indefinite term for moral rights. The second is only concerned with the duration of the economic aspects of TCEs. The IGC could consider whether the options could be merged and whether time limits should be imposed on the period of protection for the economic aspects of TCEs.

Formalities (Article 8 of the TK text and Article 7 of the TCE text)

93. Article 8 of the TK text includes two divergent views which are (1) not to subject the protection to any formalities and (2) to require formalities. Perhaps this issue could be addressed at the national level.

94. Article 7 of the TCE text contains brackets around the phrase “as a general principle”. This phrase is used to cover the situation where formalities could be an optional requirement, but would not hinder the grant of protection. If this is the case, there seems to be agreement that protection would not be subject to any formality and the brackets could be removed.

Transitional Measures (Article 9 of both texts)

95. As concerns TCEs, there seems to be agreement that the instrument should apply to all TCEs which, at the moment of entry into force, fulfill the criteria of protection (paragraph 1). However, there is disagreement as to how the rights of third parties acquired prior to the entry into force of the instrument should be treated. In this respect, paragraph 2 presents two options: one protects the existing rights of third parties, and the second provides for continuing uses by third parties to be brought into conformity with the instrument.

96. Paragraph 3 deals with the issue of recovery of TCEs. It is not clear whether this provision is aimed at the recovery of rights in TCEs, or the recovery of the TCEs themselves, as objects of cultural property, in which case it may not fall within the IP scope of the IGC's work and it may be in conflict with other international instruments, notably the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

Consistency with the General Legal Framework (Article 10 of both texts)

97. This article deals with the relationship that the new instrument would have with other international instruments, including those dealing with IP and with cultural heritage. The different approaches within this article seem clear. More discussion is needed to reconcile the different views.

National Treatment (Article 11 of both texts)

98. The content of this article does not seem controversial, however it is tied to the question of the status of the instrument and the options available for addressing international enforceability issues. Over time two approaches have been considered: (1) “national treatment” (in short, an eligible foreign right holder should enjoy the same rights as domestic nationals) and (2) “reciprocity” (in short, whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country), though the wording of the alternatives could be improved. These questions and options will have to be addressed by the IGC.

Trans-Boundary Cooperation (Article 12 of both texts)

99. The IGC could consider whether issues of trans-boundary cooperation could be addressed in the provision dealing with Sanctions, Remedies and Exercise of Rights/Interests.

[Annex follows]

Issues	WIPO/GRTKF/IC/27/4 The Protection of Traditional Knowledge: Draft Articles	WIPO/GRTKF/IC/27/5 The Protection of Traditional Cultural Expressions: Draft Articles
Objectives	POLICY OBJECTIVES The protection of traditional knowledge should aim to: Recognize value (i) recognize the [holistic] [distinctive] nature of traditional knowledge and its intrinsic value, including its social, spiritual, [economic], intellectual, scientific, ecological, technological, [commercial], educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are [fundamentally] intrinsically important for indigenous peoples and local communities and have equal scientific value as other knowledge systems; Promote awareness and respect (ii) promote awareness and respect for traditional knowledge systems; for the dignity, cultural [integrity] heritage and intellectual and spiritual values of the traditional knowledge [holders]/[owners] who conserve, develop and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge [holders]/[owners]; and for the contribution which traditional knowledge [holders]/[owners] have made to the [conservation of the environment] conservation and sustainable use of biodiversity, to food security and sustainable agriculture, and to the progress of science and technology; Meet the [actual] rights and needs of holders of traditional knowledge (iii) [be guided by the aspirations and expectations expressed directly by traditional knowledge [holders]/[owners]] be guided by the rights and needs of the holders of traditional knowledge and society, respect their rights as	OBJECTIVES 1. To provide Indigenous [Peoples] and [local communities] [and nations] / [beneficiaries] with the [legal and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to: [1 alt. To provide beneficiaries with the appropriate measures, which may include legal and practical means, to:] a. [prevent] the [misappropriation and misuse/offensive and derogatory use] of their traditional cultural expressions [and adaptations thereof]; and b. control ways in which their traditional cultural expressions [and adaptations thereof] are used beyond the traditional and customary context [and promote the equitable sharing of benefits arising from their use], as necessary. 2. [To [prevent/preclude] the [grant], exercise and [enforcement] of intellectual property rights [acquired by unauthorized parties/inappropriately acquired] over traditional cultural expressions [and their adaptations]].

	[holders]/[owners] and custodians of traditional knowledge under national and international law, contribute to their welfare and economic, cultural and social benefit and [reward] recognize the value of the contribution made by them to their communities and to the progress of science and socially beneficial technology, taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration; Promote [conservation and] preservation of traditional knowledge (iv) 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]]; Empower [holders]/[owners] of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems (v) be undertaken in a manner that empowers traditional knowledge [holders]/[owners] to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misuse and misappropriation, and should effectively empower associated traditional knowledge [holders]/[owners] to exercise due rights and authority over their own knowledge; Support traditional knowledge systems (vi) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between knowledge [holders]/[owners]; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;	3. [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 and informed consent of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]] 4. To protect/safeguard [and reward] [tradition-based] creativity [[and innovation] based on the traditional cultural expressions of Indigenous [Peoples] and [local communities] and nations / beneficiaries]. [4. alt. To protect and reward creativity and innovation by Indigenous Peoples and [local communities] for their traditional cultural expressions.] [5. To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]
--	---	---

	Contribute to safeguarding traditional knowledge (vii) while [recognizing the value of a vibrant public domain], contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary and community practices, norms, laws and understandings of traditional knowledge [holders]/[owners], for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general on the basis of prior informed consent and the mutually agreed terms with the [holders]/[owners] of that knowledge;⁶ [Repress] Prevent [unfair and inequitable uses] misappropriation and misuse (viii) repress the misappropriation of [protected] [secret] traditional knowledge and other unfair commercial and non commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of [protected] [secret] traditional knowledge to national and local needs; Respect for and cooperation with relevant international agreements and processes (ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit sharing from genetic resources which are associated with that traditional knowledge; Promote innovation and creativity (x) encourage and reward [and protect] tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous peoples and [traditional] local communities], including, subject to the consent of the traditional knowledge [holders]/[owners], by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge];	
--	---	--

⁶ One delegation proposed that paragraph (vii) be combined with paragraphs (iv) or (vi) for simplification.

	Alternative (x) [[safeguard and] promote innovation, creativity and the progress of science, and promote the transfer of technology on mutually agreed terms;] [End of alternative] Ensure prior informed consent and exchanges based on mutually agreed terms (xi) promote the use of contractual arrangements between the holders of protected traditional knowledge and those who obtain protected traditional knowledge from such holders in order to ensure the [use] safeguarding of traditional knowledge on the basis of customary laws, protocols and community procedures [with] through prior informed consent and exchanges based on mutually agreed terms, in [coordination] line with existing international and national regimes governing access to genetic resources in a fair and equitable manner; [Promote mandatory disclosure requirement (xi bis) ensure mandatory disclosure requirement of the country of origin of traditional knowledge and associated genetic resources that are related or used in the patent application] Alternative (xi bis) ensure that traditional knowledge is compiled in databases that are available to patent examiners, except when the traditional knowledge is secret traditional knowledge, and when a holder of secret traditional knowledge makes such knowledge available to another, promote the use of contracts so that the permitted uses and further disclosure of the traditional knowledge is understood by the parties to the contract; Promote equitable benefit sharing (xii) [promote] guarantee the fair and equitable sharing and distribution of
--	--

	monetary and non monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent [and including through [fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed] the establishment of mutually agreed conditions]; Promote community development and legitimate trading activities (xiii) [if so desired] where requested by the [holders]/[owners] of traditional knowledge, promote the use of traditional knowledge for community based development, recognizing the rights of [traditional] indigenous peoples and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge [holders]/[owners] and custodians seek such development and opportunities consistent with their right to freely pursue economic development; Preclude the grant of [improper] IP rights to unauthorized parties (xiv) [curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring [the creation of digital libraries of publicly known traditional knowledge and associated genetic resources], [in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit sharing conditions have been complied with in the country of origin]; Alternative (xiv) [[curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring each [Member States]/[Contracting Parties] [could]/[to] consider, with the prior informed consent of its indigenous peoples and local communities, the creation of digital libraries of publicly-known traditional knowledge and associated genetic resources];	
--	---	--

	[End of alternative] Enhance transparency and mutual confidence (xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge [holders]/[owners] on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct [and the principles of free and prior informed consent]; Complement protection of traditional cultural expressions (xvi) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their [holistic identity].] [Utilization of traditional knowledge by third parties (xvii) [enable the utilization of] facilitate access to protected traditional knowledge by third parties on mutually agreed terms;] [Promote access to knowledge and safeguard the public domain (xviii) promote access to knowledge and safeguard the public domain.] Document and conserve traditional knowledge (xix) 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 understandings of traditional knowledge holders, including those customary practices, norms, laws and understandings that require prior informed consent and mutually agreed terms before the traditional knowledge can be disclosed, learned or used by others; Promote innovation (xx) 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; Alternative (i) recognize the [holistic] [distinctive] nature of traditional knowledge, including its social, spiritual, economic, intellectual, educational and cultural importance; (ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; (iii) meet the actual needs of [holders]/[owners] and users of traditional knowledge taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration; (iv) promote and support conservation, application and preservation of traditional knowledge; (v) support traditional knowledge systems; Alternative ((iv) + (v)) Promote the conservation of traditional knowledge promote the conservation and the preservation of traditional knowledge and support traditional knowledge systems; [End of alternative] (vi) [repress] prevent [unfair and inequitable uses] illicit appropriation of traditional knowledge; (vii) operate consistently with relevant international agreements and	
--	---	--

	instruments [and processes]; (viii) promote the fair and equitable sharing of benefits arising from the use of traditional knowledge; Alternative ((vi) + (viii)) Promote community development Promote community development through the supporting of traditional knowledge systems and the prevention of misappropriation; [End of alternative] (ix) enhance transparency and mutual confidence in relations between traditional knowledge [holders]/[owners] on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct [and the principles of free and prior informed consent]. [End of alternative]	
--	---	--

Principles	GENERAL GUIDING PRINCIPLES These principles should be respected to ensure that the specific substantive provisions concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection: (a) Principle of responsiveness and assistance to the [needs and expectations of] rights and needs regarding the protection of traditional knowledge identified by traditional knowledge [holders]/[owners] (b) Principle of recognition of rights regarding the protection of traditional knowledge of indigenous peoples as enunciated within the United Nations Declaration on the Rights of Indigenous Peoples and ILO 169 Alternative (b) Principle of recognition of the interests of traditional knowledge [holders]/[owners] [End of alternative] (c) Principle of effectiveness and accessibility of protection (d) Principle of flexibility and comprehensiveness (e) Principle of equity and benefit sharing Alternative (e) Principle of mandatory disclosure of country of origin and equity, including benefit sharing [End of alternative] (f) [Principle of consistency with existing legal systems governing access to traditional knowledge and associated genetic resources]	<u>[Principles / Objectives:] / [Preamble]</u> [6. [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. 7. [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. 8. [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. 9. [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. 10. [Respecting]/[to respect] the continuing customary use, development, exchange and
--------------------------	--	---

	(g) [Principle of respect for and cooperation with] Principle of cooperative interface [other] among international and [regional instruments and] negotiation processes Alternative ((f) + (g)) Principle of consistency with, respect for and cooperation between existing international and regional instruments, legal systems and negotiation processes regarding access to traditional knowledge and associated genetic resources. [End of alternative] Alternative (g) Principle of compatibility or consistency, respect for other instruments and international processes as well as regional and cooperation processes including those processes governing genetic resource. [End of alternative] (h) Principle of respect for customary use and transmission of traditional knowledge Alternative (h) Principle of recognition of respect for indigenous knowledge, cultures and traditional practices and the contributions to sustainable development and proper management of the environment [End of alternative] Alternative (h) Principle of respect for use and transmission of traditional knowledge [End of alternative]	transmission of traditional cultural expressions by, within and between communities. 11. [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]. 12. [Recognizing]/[to recognize] the importance of preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general. 13. [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.]
--	---	--

	(i) Principle of recognition of the specific characteristics of traditional knowledge (j) Principle of providing assistance to address the needs of traditional knowledge holders Alternative ((a) + (j)) Principle of responsiveness [and assistance] to the [needs and] interests of traditional knowledge [holders]/[owners] and those who make use of traditional knowledge [End of alternative] (k) [Principle of recognizing that knowledge that is in the public domain is the common heritage of mankind] (l) [Principle of protecting, preserving and expanding the public domain] (m) [Principle of the necessity for new incentives to share knowledge and to minimize restrictions on access] (n) Principle that any monopoly on the right to use certain information should be for a limited time (o) Principle of protecting and supporting the interests of creators	
--	---	--

Subject Matter of Protection	ARTICLE 1 SUBJECT MATTER OF PROTECTION Definition of Traditional Knowledge 1.1 For the purposes of this instrument, “traditional knowledge” [refers to]/[includes]/[means] know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[for a state or states]² that are dynamic and evolving, and that are intergenerational/and that are passed on from generation to generation, and which may subsist in codified, oral or other forms. [Traditional knowledge may be associated, in particular, with fields such as agricultural, environmental, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.] Definition of Traditional Knowledge Associated with Genetic Resources 1.2 [Traditional knowledge associated with genetic resources means [substantive] knowledge of the [properties], and uses of genetic resources and their derivatives held by indigenous [peoples] and local communities [and which directly leads to a claimed invention].] Criteria for Eligibility 1.3 Protection extends [only] to traditional knowledge that is [distinctively] associated/linked with the cultural, [and] social identity, [and] or cultural heritage of beneficiaries as defined in Article 2, that is generated, maintained, shared/transmitted in collective context, that is intergenerational/that is passed on from generation to generation³ [and has been used for a term as may	[ARTICLE 1] SUBJECT MATTER OF PROTECTION Option 1 Definition of Traditional Cultural Expressions 1. Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof, Alternative 1: in which traditional culture [and knowledge] are [embodied] Alternative 2: which are [indicative] of traditional culture [and knowledge] which is intergenerational⁵/from generation to generation and between generations, including, but not limited to: phonetic and verbal expressions¹, [musical and sound expressions]², [expressions by action]³, tangible expressions⁴, [and adaptations of these expressions]. Criteria for Eligibility 2. Protection extends to traditional cultural expressions that are: (a) [the result of the creative intellectual activity] of; [and/or] (b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or] (c) [held], maintained, used and/or developed as part of the cultural or social identity [or heritage] of the beneficiaries as defined in Article 2.
--	---	---

	be determined by each [Member State]/[Contracting Party] but of not less than [fifty years]] [recognizing the [cultural] diversity of the beneficiaries] recognizing that there is cultural diversity amongst beneficiaries.⁴ 1.4 [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, [for a reasonable period of time], in the public domain, protected by an intellectual property right or the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.]⁵ Databases 1.5 [Traditional knowledge that is contained in databases may be used to prevent the erroneous grant of [patents]/[intellectual property rights].] ² One delegation suggested that the phrase “a state or states” could be added to the phrase [indigenous [peoples] and [local communities]]; facilitators have used a forward slash and square brackets around the phrase “or a state or states” to indicate that the proposing delegation intends the phrase “or a state or states” to be an addition to, and not replace, the phrase [indigenous [peoples] and [local communities]]. ³ Facilitators have reinserted the concept of “intergenerational/passed on from generation to generation” in 1.3 on the request of some delegations, but facilitators note that since this concept is already present in 1.1, it may not be necessary to repeat it here. ⁴ One delegation suggested that 1.3 could be moved to Article 7 (Term of Protection). ⁵ One delegation suggested that 1.4 could be moved to Article 6 (Exceptions and Limitations).	3. The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and, where applicable, regional law. [Option 2 1. For the purposes of this instrument, “traditional cultural expressions” include any form of [creative and other spiritual] expressions, tangible or intangible, or a combination thereof, such as phonetic and verbal, musical and sound, actions, tangibles and materials [and their adaptations] regardless of the form in which it is expressed, illustrated or embodied and are: a) intergenerational and/or passed on from generation to generation; b) distinctive to or associated with the traditional culture, knowledge, or heritage of the beneficiaries; and c) maintained, used or developed as part of their collective culture or social identity. 2. The terminology used to describe the protected subject matter may be determined in accordance with national law and, where applicable, regional law.] ¹ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.] ² [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.] ³ [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.] ⁴ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.] ⁵ Intergenerational includes being passed on from generation to generation or between generations.
--	--	--

Beneficiaries of Protection	ARTICLE 2 BENEFICIARIES OF PROTECTION 2.1 Beneficiaries of protection are indigenous [peoples] and local communities [and nations] [who hold, maintain, use and/[or] develop] the [secret] [protected] traditional knowledge as defined in Article 1/1.3, [or any other national entity defined by national law.] 2.2 [Where [protected] traditional knowledge as defined in Article 1 is not specifically attributable or confined to an indigenous [people] or local community, [or] and it is not possible to identify the [people or] community that generated it, [Member States]/[Contracting Parties] may define [a]/[any] national entity defined by national legislation as a beneficiary.] Optional addition 2.3 [Beneficiaries of [defensive protection] of [protected] traditional knowledge as defined in Article 1, are indigenous peoples and communities, local communities [as well as society at large].]	[ARTICLE 2] BENEFICIARIES OF PROTECTION Option 1 1. [Indigenous [Peoples] or [local communities] [or nations] who [hold, maintain, use [and/or] develop their traditional cultural expressions as part of their collective cultural or social identity] are the beneficiaries of protection in respect of those traditional cultural expressions as defined in Article 1 [or an entity defined by national legislation as a beneficiary].] 2. [Where a traditional cultural expression is not specifically attributable or confined to an/the Indigenous [People] or [local community] that [holds, maintains, uses [and/or] develops it] [and/or] it is not possible to [identify] the Indigenous [People] or [local community] that holds, maintains, uses or develops it, [Member States]/[Contracting Parties] may define [a]/[any] national entity as a beneficiary by national legislation.] Option 2 [1. Beneficiaries of protection of traditional cultural expressions as defined in Article 1 are Indigenous [Peoples] and [local communities], or as determined by national law. 2. Where traditional cultural expressions as defined in Article 1 are not specifically attributable or confined to an/the indigenous [people] or [local community], or it is not possible to identify the [indigenous people] or community that generated it, Contracting Parties may define any national entity defined by national legislation as a beneficiary.]
------------------------------------	---	---

Scope of Protection	ARTICLE 3 SCOPE OF PROTECTION⁶ Option 1 3.1 [Member States]/[Contracting Parties]/[This instrument] [should]/[shall] confer(s) the following [exclusive] [collective] rights on the beneficiaries, as defined in Article 2 : (a) to maintain, control, [protect] and develop their [protected] [secret] traditional knowledge; (b) [to authorize or deny the access to and use/utilization based on prior and informed consent;] (c) to have a fair and equitable share of benefits arising from the use/utilization of their traditional knowledge in accordance with the terms set out as a condition for the prior and informed consent; (d) [to be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications;] (dbis) [require the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.] 3.2 [In addition to the protection provided for in Paragraph 1, users of traditional knowledge which fulfills the criteria in Article 1.3 [should]/[shall]]: (a) acknowledge the source of traditional knowledge and	[ARTICLE 3] SCOPE OF PROTECTION [Option 1] The economic and moral interests of the beneficiaries concerning their traditional cultural expressions, as defined in Articles 1 and 2, shall/should be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.] [Option 2] Adequate and effective legal, administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to: (a) have exclusive and inalienable collective rights to authorize and prohibit the use⁶ and exploitation of traditional cultural expressions by others; (b) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions; (c) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible; (d) prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary; (e) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and
-----------------------------------	---	---

	attribute the beneficiary, unless the beneficiary decides otherwise; and (b) use 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 traditional knowledge. 3.3 The beneficiaries as defined under Article 2 [should]/[shall] have the right to initiate legal proceedings where their rights under Paragraphs 1 and 2 are violated or not complied with. [Definition of ["use"/["utilization"]] [For the purposes of this instrument, the term ["use"/["utilization"]] in relation to traditional knowledge [should]/[shall] refer to any of the following acts: (a) Where the traditional knowledge is a product: (i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context. (b) Where the traditional knowledge is a process: (i) making use of the process beyond the traditional context; or (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or (c) When traditional knowledge is used for research and development leading to profit-making or commercial purposes.]⁷	services, that suggest endorsement by or linkage with the beneficiaries.] ⁶ Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.
--	---	--

	Option 2 3.1 [[Member States]/[Contracting Parties] should provide [adequate and effective] legal, policy or administrative measures, as appropriate [and in accordance with national law], to: (a) discourage the unauthorized disclosure, use or other uses of [secret] [protected] traditional knowledge; (b) where [protected] traditional knowledge is knowingly used outside the traditional context: (i) [acknowledge the source of traditional knowledge and attribute its beneficiaries/holders/owners where known unless they decide otherwise]; (ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its beneficiaries/holders/owners; (iii) encourage beneficiaries and users to establish mutually agreed terms; Alternative (iii) ensure that[, where the traditional knowledge [is secret]/[is not widely known,]] traditional knowledge holders and users establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits in compliance with the right of local communities to decide to grant access to that knowledge or not; [(c) facilitate the development of national traditional knowledge databases for the defensive protection of traditional knowledge; (d) facilitate, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;	
--	--	--

	(e) provide opposition measures that will allow third parties to dispute the validity of a patent by submitting prior art; (f) encourage the development and use of voluntary codes of conduct; and (g) discourage information lawfully within the beneficiaries'/holders'/owners' control from being disclosed, acquired by or used by others without the beneficiaries'/holders'/owners' [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.] ⁶ While two options are represented here, a number of delegations indicated their view that these two options are complementary and could be combined into a third option (which would thus comprise both Option 1 and Option 2), which one delegation said would be consistent with existing intellectual property treaties. ⁷ Facilitators note that this proposed definition is not part of either option; certain delegations have suggested that it be part of any glossary or list of terms. Facilitators have left this proposed definition here as a placeholder.	
--	--	--

Sanctions, Remedies and Exercise of Rights/ Application	ARTICLE 4 SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION 4.1 [Member States]/[Contracting Parties] [should]/[shall] [endeavor to]/[undertake to] adopt [[as appropriate and] in accordance with national law], the appropriate legal policy and/or administrative measures necessary to ensure the application of this instrument. Optional addition 4.2 Member States [should]/[shall] ensure that [accessible, appropriate and adequate] [criminal, civil [and] or administrative] enforcement procedures [, dispute resolution mechanisms], border measures], 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 or misuse of traditional knowledge] sufficient to constitute a deterrent to further infringements. Optional addition 4.2.1 Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use. Optional addition 4.2.2 The procedures referred to in paragraph 4.2 should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for [holders]/[owners] of protected traditional knowledge. [They should also provide safeguards for legitimate third party interests and the public interest.]	[ARTICLE 8 SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS 1. (Option 1): Appropriate measures shall/should be provided, in accordance with national law, to ensure the application of this instrument, including legal, policy or administrative measures to prevent wilful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent. 1. (Option 2): Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies including criminal and civil remedies, shall/should be available in cases of breach of the protection for traditional cultural expressions. 2. The means of redress for safeguarding the protection granted by this instrument shall/should be governed by the national law of the country where the protection is claimed. 3. [Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall/should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.⁷]] ⁷ Such as the WIPO Arbitration and Mediation Center
---	---	--

	Optional addition 4.3 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]. Alternative [Member States]/[Contracting Parties] [should]/[shall]: (a) adopt, in accordance with their [legal systems] national law, the measures necessary to ensure the application of this instrument; (b) provide for adequate, effective and deterrent criminal and/or civil and/or administrative remedies, for the violation of the rights provided under this instrument; and (c) provide procedures for exercise of rights which are accessible, effective, fair, adequate and not burdensome for beneficiaries of traditional knowledge [and, where appropriate, may provide for dispute resolution mechanism based on customary protocols, understandings, laws and practices of beneficiaries]. [End of alternative]	
--	---	--

Disclosure Requirement	ARTICLE 4 BIS DISCLOSURE REQUIREMENT 4 BIS.1 [[Patent and plant variety] 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 or the breeder] 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 to access and use has been obtained.] 4 BIS.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 or the breeder] applicant collected or received the traditional knowledge.] 4 BIS.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 or plant variety] 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 or plant variety] intellectual property office may reject the application.] 4 BIS.4 [Rights arising from a granted patent or a granted plant variety right 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 and the plant variety system, provided for in national law, including criminal sanctions such as fines, may however be imposed.]	
--------------------------------------	---	--

	Alternative 4 BIS.4 Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has failed to comply with the obligations of mandatory requirements as provided for in this article or provided false or fraudulent information. [End of alternative]	
--	---	--

Administration of Rights	ARTICLE 5 ADMINISTRATION [OF RIGHTS] 5.1 [Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] an appropriate national or regional competent authority (or authorities) [with the free, prior and informed consent of] [in consultation with] [traditional knowledge [holders]/[owners]], in accordance with their national law [and without prejudice to the right of traditional knowledge [holders]/[owners] to administer their rights according to their customary protocols, understandings, laws and practices]. The functions of any such authority may include, but need not be limited to, the following [, where so requested by the [holders]/[owners]] [, to the extent authorized by the [holders]/[owners]]: (a) disseminating information and promoting practices about traditional knowledge and its protection; (b) [ascertaining whether free, prior informed consent has been obtained]; (c) providing advice to traditional knowledge [holders]/[owners] and users on the establishment of mutually agreed terms; (d) [applying the rules and procedures of the national legislation regarding prior and informed consent]; [(e) applying the rules and procedures of the national legislation regarding [and supervising] the fair and equitable sharing of benefits; and] (f) assisting, where possible and appropriate, the [holders]/[owners] of traditional knowledge in the use, [practice]/[exercise] and enforcement of their rights over their traditional knowledge;	[ARTICLE 4] ADMINISTRATION OF RIGHTS/INTERESTS Option 1 (merger of existing options) 1. Where so requested by the beneficiaries, Alternative 1: a competent authority (regional, national or local) Alternative 2: a national competent authority may, to the extent authorized by the beneficiaries, and in accordance with: Alternative 1: the traditional-decision-making and governance processes of the beneficiaries Alternative 2: customary protocols, understandings, laws and practices Alternative 3: national law Alternative 4: national procedure Alternative 5: international law carry out the following functions (but need not be limited to such functions): (a) conduct awareness-raising, education, advice and guidance functions; (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use; (c) grant licenses; (d) collect monetary or non-monetary benefits from the use of the traditional cultural expressions and provide them to the beneficiaries [for the preservation of traditional cultural expressions];
--	--	--

	(g) [determining whether an act pertaining to traditional knowledge constitutes an infringement or another act of unfair competition in relation to that knowledge]. Alternative 5.1(a) Researchers and others [should]/[shall] seek the prior informed consent of communities holding traditional knowledge, in accordance with customary laws of the concerned community, before obtaining protected traditional knowledge. (b) The rights and responsibilities flowing from access to protected traditional knowledge [should]/[shall] be agreed upon by the parties. The terms for the rights and responsibilities may include providing for the equitable sharing of benefits arising from any agreed use of the protected knowledge, the provision of benefits in exchange for access, even without benefits being derived from use of the traditional knowledge or other arrangements as agreed. (c) Measures and mechanisms for obtaining prior informed consent and mutually agreed terms [should]/[shall] be understandable, appropriate and not burdensome for all relevant stakeholders, in particular for protected traditional knowledge holders; and [should]/[shall] ensure clarity and legal certainty. (d) To assist transparency and compliance, [Member States]/[Contracting Parties] may establish a database to collect information on parties involved in agreements providing for mutually agreed terms as under Article 3. This information may be supplied by any of the parties involved in the agreement. [End of alternative] 5.2 [Where traditional knowledge fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation and approval of the traditional knowledge [holders]/[owners] where possible, administer the rights of that traditional knowledge, in accordance with national law.]	(e) establish the criteria to determine any monetary or non-monetary benefits; (f) provide assistance in any negotiations for the use of the traditional cultural expressions and in capacity building; (g) [If determined by national law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights in relation to a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to a community] [2. The management of the financial aspects of the rights shall/should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries]. Option 2 (short option) Where so requested by the beneficiaries, a competent authority may, to the extent authorized by the beneficiaries and for their direct benefit, assist with the management of the beneficiaries' rights/interests under this [instrument].]
--	---	---

	5.3 [The identity of the [competent] national or regional authority or authorities [should]/[shall] be communicated to the Secretariat of the World Intellectual Property Organization.] 5.4 [The established authority shall include authorities originating from indigenous peoples so that they form part of that authority.]	
--	--	--

Application of Collective Rights	ARTICLE 5 BIS APPLICATION OF COLLECTIVE RIGHTS 5 BIS.1 [Member States]/[Contracting Parties] [should]/[shall] establish, in consultation with the [holders]/[owners] of the traditional knowledge, and with their free prior informed consent, a national authority or authorities with the following functions: (a) adopt appropriate measures to guarantee the safeguarding of traditional knowledge; (b) disseminate information and promote practices, studies and research for the conservation of traditional knowledge when it is required by their [holders]/[owners]; (c) give assistance to the [holders]/[owners] on the exercise of their rights and obligations in case of disputes with users; (d) inform the public regarding the threats facing traditional knowledge; (e) verify whether the users have obtained the free prior informed consent; and (f) supervise the fair and equitable sharing of benefits derived from the utilization of traditional knowledge. 5 BIS.2 The nature of the national or regional authority or authorities, created with the participation of indigenous peoples, [should]/[shall] be communicated to the Secretariat of the World Intellectual Property Organization.]	
--	--	--

Exceptions and Limitations	ARTICLE 6 EXCEPTIONS AND LIMITATIONS 6.1 [Measures for the protection of traditional knowledge should 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].⁸ General Exceptions 6.2 [Member States]/[Contracting Parties] may adopt appropriate limitations and exceptions under national law [with the prior informed consent of the beneficiaries] [in consultation with the beneficiaries] [with the involvement of beneficiaries], provided that the use of [protected] traditional knowledge: (a) [acknowledges the beneficiaries, where possible;] (b) [is not offensive or derogatory to the beneficiaries;] (c) [is compatible with fair practice;] (d) [does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and] (e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.] 6.3 [When there is reasonable apprehension of irreparable harm related to secret and sacred traditional knowledge, [Member States]/[Contracting Parties] [may]/[shall]/[should] not establish exceptions and limitations.]	[ARTICLE 5] EXCEPTIONS AND LIMITATIONS 1. Measures for the protection of traditional cultural expressions shall/should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the contracting parties/member States/members where applicable]. 2. Limitations on protection shall/should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional [or] cultural context. 3. Contracting parties/Member States/Members may adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]: (a) are limited to certain special cases; (b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;] (c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;] (d) [ensure that the [use] of traditional cultural expressions: i. is not offensive or derogatory to the beneficiaries; ii. acknowledges the beneficiaries, where possible;] and iii. [is compatible with fair practice.]]] 4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following shall/should be permitted [only with the free prior and informed consent of the
--	--	---

	6.4 [Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible under the national law of a [Member State]/[Contracting Party] for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.] Specific Exceptions 6.5 [[Member States]/[Contracting Parties] may permit the use of [protected] traditional knowledge in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use[, provided that the beneficiaries are adequately compensated.] without consent of the traditional knowledge [holders]/[owners]. 6.6 [[Member States]/[Contracting Parties] may exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.]] 6.7 [Member States]/[Contracting Parties] may adopt appropriate limitations or exceptions under national law for the following purposes: (a) teaching, learning, but does not include research resulting in profit-marking or commercial purposes; (b) for preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes. 6.8 [Regardless of whether such acts are already permitted under Paragraph 1, the following shall be permitted: (a) the use of traditional knowledge in cultural institutions recognized under the appropriate national law, archives, libraries, museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted; and
beneficiaries]: (a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education; (b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions]. 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 copyright or signs and symbols protected by trademark law, such act shall/should not be prohibited by the protection of traditional cultural expressions].	

	(b) the creation of an original work of authorship inspired by traditional knowledge.] 6.9 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 3 shall not apply to any use of knowledge that:] (a) has been independently created [outside the beneficiaries' community]; (b) [legally] derived from sources other than the beneficiary; or (c) is known [through lawful means] outside of the beneficiaries' community.] 6.10 [Protected traditional knowledge shall not be deemed to have been misappropriated or misused if the protected traditional knowledge was: (a) obtained from a printed publication; (b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent; or (c) mutually agreed terms for access and benefit sharing apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.] 6.11 [National authorities shall exclude from protection traditional knowledge that is already available without restriction to the general public.]	
--	--	--

⁸ Some delegations suggested that language in 6.1 could be better placed in any preambular section.

Term of Protection	ARTICLE 7 TERM OF PROTECTION Option 1 [Member States]/[Contracting Parties] may determine the appropriate term of protection of traditional knowledge [which may] [should]/[shall] last as long as the traditional knowledge fulfills/satisfies the criteria of eligibility for protection according to Article 1. Optional additions to Option 1 (a) traditional knowledge is transmitted from generation to generation and thus is intransmissible (b) the protection [should]/[shall] applied and last for the life of indigenous peoples and local communities (c) the protection [should]/[shall] remain while the immaterial cultural heritage is not accessible to the public domain (d) the protection of secret, spiritual and sacred traditional knowledge [should]/[shall] last forever (e) the protection against biopiracy or any other infringement carried out with the intention of destroying wholly or partially the memory, the history and the image of indigenous peoples and communities Option 2 Duration of protection of traditional knowledge varies based upon the characteristics and value of traditional knowledge.	ARTICLE 6 TERM OF PROTECTION Option 1 1. Protection of traditional cultural expressions shall/should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and, 2. 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, shall/should last indefinitely. Option 2 At least as regards the economic aspects of traditional cultural expressions, their protection shall/should be limited in time.
----------------------------------	---	---

Formalities	ARTICLE 8 FORMALITIES Option 1 8.1 The protection of traditional knowledge [should]/[shall] not be subject to any formality. Option 2 8.1 [Member States]/[Contracting Parties] [may] require[s] formalities for the protection of traditional knowledge. [8.2 In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may [should]/[shall] maintain registers or other records of traditional knowledge.] Alternative [The protection of traditional knowledge [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.]	ARTICLE 7 FORMALITIES [As a general principle], the protection of traditional cultural expressions shall/should not be subject to any formality.
---------------------------	---	---

Transitional Measures	ARTICLE 9 TRANSITIONAL MEASURES 9.1 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 1. Optional addition 9.2 [Member States]/[Contracting Parties] should ensure the necessary measures to secure the rights [acknowledged by national law] already acquired by third parties in accordance with its national law and its international legal obligations. Alternative 9.2 Continuing acts in respect of traditional knowledge that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by these provisions, should be brought into conformity with these provisions within a reasonable period of time after they entry into force [, subject to respect for rights previously acquired by third parties in good faith].] Alternative [Notwithstanding paragraph 1, anyone who, before the date of entry into force of this instrument, has commenced to utilize traditional knowledge which was legally accessed, may continue a corresponding utilization of the traditional knowledge. Such right of utilization shall also, on similar conditions, be enjoyed by anyone who has made substantial preparations to utilize the traditional knowledge. The provision in this paragraph gives no right to utilize traditional knowledge in a way that contravenes the terms the beneficiary may have set out as a condition for access.]	[ARTICLE 9 TRANSITIONAL MEASURES 1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into effect/force, fulfill the criteria set out in Article 1. Option 1 2. The state shall/should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties. Option 2 2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, shall/should be brought into conformity with the provisions within a reasonable period of time after they enter into effect/force, subject to respect for rights previously acquired by third parties qualified by paragraph 3. 3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall/should have the right to recover such traditional cultural expressions.]
-------------------------------------	--	---

Consistency with the General Legal Framework	ARTICLE 10 CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK [Protection under this instrument [should]/[shall] [take account of, and operate consistently with, other international [and regional and national] instruments [and processes]]/[leave intact] and in no way affect the rights or the protection provided for in international legal instruments [, in particular intellectual property instruments] [, in particular the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].] Optional additions (a) In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future. (b) The provisions under this instrument should in no way diminish the protection measures that have already been granted under the auspices of other instruments or treaties. (c) These provisions should be applied in accordance to the respect of the cultural heritage of mankind as understood by UNESCO 2003 Convention of the protection of cultural and artistic expressions. (d) They should be fully in line with the FAO's 2001 Treaty on resources and they should/shall be in line with the provisions of the UN Declaration on the rights of Indigenous Peoples adopted in 2007. (e) Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples or local communities [or nations] / beneficiaries have now or may acquire in the future.]	[ARTICLE 10 CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK Wild card (merger of Options 1 and 2) Protection under this instrument shall/should take account of, and operate consistently with, other international instruments, including those dealing with intellectual property and with cultural heritage.]
--	--	---

National Treatment and Other Means of Recognizing Foreign rights and interests	ARTICLE 11 NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS [The rights and benefits arising from the protection of traditional knowledge under national/domestic measures or laws that give effect to these international provisions [should]/[shall] be available to all eligible beneficiaries who are nationals or residents of a [Member State]/[Contracting Party] [prescribed country] as defined by international obligations or undertakings. Eligible foreign beneficiaries [should]/[shall] enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.] Alternative [Nationals of a [Member State]/[Contracting Party] may only expect protection equivalent to that contemplated in this instrument in the territory of another [Member State]/[Contracting Party] even where that other [Member State]/[Contracting Party] provides for more extensive protection for their nationals.] [End of alternative] Alternative [Each [Member State]/[Contracting Party] [should]/[shall] in respect of traditional knowledge that fulfills the criteria set out in Article 1, accord within its territory to beneficiaries of protection as defined in Article 2, whose members primarily are nationals of or are domiciled in the territory of, any of the other [Member States]/[Contracting Parties], the same treatment that it accords to its national beneficiaries.] [End of alternative]	[ARTICLE 11 NATIONAL TREATMENT The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to these international provisions shall/should be available to all eligible beneficiaries who are nationals or residents of a prescribed country/contracting party/member State/member as defined by international obligations or undertakings. Eligible foreign beneficiaries shall/should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country/contracting party/member State/member of protection, as well as the rights and benefits specifically granted by these international provisions.]
--	---	---

Trans-Boundary Cooperation	ARTICLE 12 TRANS-BOUNDARY COOPERATION Facilitators' Option (Convergent Text) In instances where traditional knowledge is located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary traditional knowledge/by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation [should]/[shall] be done with the participation [and [prior informed] consent] of the traditional knowledge [holders]/[owners]. Option 1 [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 databases of traditional knowledge. [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 1.2 is included in a database, the protected traditional knowledge should only be made available to others with the prior informed consent of the traditional knowledge holder. 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	[ARTICLE 12 TRANS-BOUNDARY COOPERATION In instances where traditional cultural expressions are located in territories of different contracting parties/member States/members, those contracting parties/member States/members shall/should co-operate in addressing instances of trans-boundary traditional cultural expressions.]
--	--	---

	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. Efforts [should]/[shall] be made by national authorities to codify the information related to traditional knowledge for the purpose of enhancing the development of databases of traditional knowledge, so as to preserve and maintain such knowledge. Efforts [should]/[shall] also be made to facilitate access to information including information made available in databases relating to traditional knowledge by intellectual property offices. 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.] Optional addition to either option [Member States]/[Contracting Parties] consider the need for modalities of a global mutual benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of traditional knowledge that occurs in transboundary situations for which it is not possible to grant or obtain prior informed consent.	
--	--	--

[End of Annex and of the Non-Paper]