

WIPO General Assembly

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MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC)

Document prepared by the Secretariat

INTRODUCTION

1. The WIPO General Assembly at its Thirty-Eighth (19th Ordinary) session in September 2009 agreed on the mandate¹ for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2010-2011 biennium.
2. At the Thirty-Ninth (20th Extraordinary) session of the WIPO General Assembly, which took place from September 20 to 29, 2010, the IGC reported on the sessions it had held since the adoption of the mandate for the 2010-2011 biennium (notably its 15th and 16th sessions, which took place in December 2009 and May 2010, respectively).²
3. This current report, therefore, covers the work of the IGC on genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) from May 2010 to date. During this period, the newly-created Intersessional Working Groups (IWGs) met for the first time.

¹ WO/GA/38/20, par. 217

² WO/GA/39/9, paras. 1 to 7

IGC AND IWG SESSIONS FROM JULY 2010 TO MAY 2011

4. Following the 16th session of the IGC which had taken place in May 2010, the IGC's first Intersessional Working Group (IWG 1) met from July 19 to 23, 2010, under the chairmanship of Mrs. Savitri Suwansathit (Thailand). IWG 1 addressed TCEs. Experts worked intensively and produced a draft set of articles on TCEs which were transmitted to the IGC at its next session (December 6 to 10, 2010).
5. The IGC met, for its 17th session, from December 6 to 10, 2010 to consider the results of the first IWG on TCEs and resume discussion of the next versions of the relevant documents on TK and GRs. The Chairman of the session was His Excellency Ambassador Philip Owade of Kenya. The IGC accepted the first IWG's text on TCEs as the basis for ongoing work, and an open-ended informal drafting group further streamlined and improved the text. IGC 17 defined the work to be undertaken by the two IWGs on TK and GRs that were scheduled to meet in February 2011. Glossaries on TK and TCEs, to complement a glossary on GRs, were commissioned to facilitate the negotiations. IGC 17 also saw the launch of a fund-raising initiative by the WIPO Secretariat for the WIPO Voluntary Fund for Accredited Indigenous and Local Communities. South Africa pledged a contribution to the Fund, and the Chair strongly encouraged other delegations to contribute.
6. IWG 2, on TK, met from February 21 to 25, 2011. The session, chaired by Dr. Ian Heath (Australia), resulted in a consolidated, streamlined text on the protection of TK which was submitted to the next session of the IGC, scheduled for May 9 to 13, 2011.
7. IWG 3, on GRs, took place the following week, from February 28 to March 4, 2011, under the chairmanship of Mr. José Ramón López de León Ibarra (Mexico). The experts produced a draft text on objectives and principles which was submitted to the next session of the IGC (May 9 to 13, 2011). IWG 3 also undertook an extensive, technical and interactive discussion of several options for future work on GRs, including a proposed mandatory disclosure requirement, defensive databases and IP clauses in mutually agreed terms for access and equitable benefit-sharing. Various existing and proposed approaches were examined. A summary of this discussion was submitted to the IGC at its next session.
8. The 18th session of the IGC took place from May 9 to 13, 2011, to review, mainly, the work undertaken by IWGs 2 and 3 on TK and GRs respectively. The session was chaired by Ambassador Owade. On TK, the IGC examined the text that IWG 2 had developed and accepted it as the basis for negotiations. After a lengthy plenary discussion, an informal, open-ended drafting group developed a streamlined text which the IGC in plenary noted and transmitted to the next IGC (July 18 to 22, 2011).
9. The 18th session of the IGC accepted the third IWG's text on objectives and principles on the relationship between intellectual property and GRs as a basis for its ongoing work, and an open-ended informal drafting group was established to refine and streamline the text. The drafting group made progress and the modified objectives and principles were noted by the IGC in plenary and transmitted to the next IGC (July 18 to 22, 2011). Discussions were also held at IGC 18 on the options for future work on IP and GRs, on the basis of the summary of the discussion that had taken place at IWG 3.

IGC 19: JULY 18 TO 22, 2011

10. The 19th session of the IGC took place from July 18 to 22, 2011, again under the Chairmanship of Ambassador Owade. This was the last session of the IGC under its mandate for the 2010-2011 biennium, and it is recalled that, under its mandate for the 2010-2011 biennium, the IGC was “requested to submit to the 2011 General Assembly the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2011 will decide on convening a Diplomatic Conference.”

11. IGC 19, therefore, addressed both the substance of its work as well as its “future work”. What follows below is a summary of the decisions taken by IGC 19. The full text of the decisions is available on WIPO’s website.³

12. On substance, on each of the three substantive themes (TCEs, TK and GRs), the IGC discussed the then current draft texts in plenary session. Regarding TCEs and TK, the discussion focused on Articles 1, 2, 3 and 5 of the TCE text and Articles 1, 2, 3 and 6 of the TK text. “Facilitators” further consolidated and streamlined the texts, which the IGC in plenary then accepted as the bases for future work. The texts as prepared by the Facilitators, respectively on TCEs, TK and GRs, were transmitted by the IGC to its next session. The text on GRs also includes certain amendments made by the IGC in plenary.

13. Copies of these most recent texts on TCEs, TK and GRs are annexed to this document, as “A”, “B” and “C” respectively. As requested by the IGC, the texts on TCEs and TK, in respect of which the Facilitators only worked on the Articles that had been discussed in the plenary, also include the associated commentary and policy considerations drafted by the Facilitators. These texts will in due course, should the mandate of the IGC be renewed (see below), be issued as formal working documents for the IGC’s next session.

14. At IGC 19, the Delegation of Indonesia, speaking on behalf of a cross-regional group of like-minded developing countries, presented draft texts on TK, TCEs and GRs to the session, and the IGC agreed to transmit these texts to its next session.

15. On GRs, discussion was also held on defensive databases, a proposed mandatory disclosure requirement and intellectual property clauses in mutually agreed terms for access and equitable benefit sharing. The IGC requested the Secretariat to finalize certain activities and to provide information thereon to the IGC at each session, and to re-issue, with some modifications, the relevant document as a working document for the next session. The IGC also requested the Secretariat to update the three existing glossaries on TK, TCEs and GRs, and to consolidate them into one.

³ See <http://www.wipo.int/tk/en/index.html>

16. At its 19th session, the IGC agreed to recommend to the WIPO General Assembly the renewal of its mandate for the 2012-2013 biennium. In this regard, the IGC agreed to recommend the following decision to the General Assembly:

Bearing in mind the Development Agenda recommendations, the WIPO General Assembly agrees that the mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore be renewed as follows:

(a) The Committee will, during the next budgetary biennium (2012/2013), and without prejudice to the work pursued in other fora, expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.

(b) The Committee will follow, as set out in the [table below], a clearly defined work program, based on sound working methods, for the 2012/2013 biennium. This work program will make provision initially for four sessions of the IGC, three of which will be thematic, as detailed in the future work program of the IGC, taking into account sub paragraph (d) with regard to the possible consideration by the General Assembly in 2012 of the need for additional meetings.

(c) The focus of the Committee's work in the 2012/2013 biennium will build on the existing work carried out by the Committee and use all WIPO working documents, including WIPO/GRTKF/IC/19/4, WIPO/GRTKF/IC/19/5, WIPO/GRTKF/IC/19/6 and WIPO/GRTKF/IC/19/7, which are to constitute the basis of the Committee's work on text-based negotiations, as well as any other textual contributions by Members.

(d) The Committee is requested to submit to the 2012 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2012 will take stock of and consider the text(s), progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process.

(e) The General Assembly requests the International Bureau to continue to assist the Committee by providing Member States with necessary expertise and funding, in the most efficient manner, of the participation of experts from developing countries and LDCs, taking into account the usual formula.

(f) With a view to enhancing the positive contribution of observers, the General Assembly invites the Committee to review its procedures in this regard. To facilitate this review, the General Assembly requests the secretariat to prepare a study outlining current practices and potential options.

Date	Activity
February 2012	IGC 20 (GRs). Undertake text based negotiations with a focus on considering options for a draft legal text as detailed in WIPO/GRTKF/IC/19/7. In developing this text, the IGC should also carefully consider texts already submitted by Members. Duration 8 days, including Saturday.

April/May 2012	IGC 21 (TK). Focus on 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions.
July 2012	IGC 22 (TCEs). Focus on 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions
September 2012	WIPO General Assembly
2013	IGC 23. Consider decision of General Assembly and take stock of further work required to finalize the text/s.

CONTRIBUTION TO THE IMPLEMENTATION OF THE DEVELOPMENT AGENDA RECOMMENDATIONS

17. Further to the 2010 WIPO General Assembly decision “to instruct the relevant WIPO Bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendations”, IGC 19 also discussed the contribution of the IGC to the implementation of the Development Agenda Recommendations.

18. In this regard, the following statements were made at IGC 19. These will also appear in the initial draft report of IGC 19 (WIPO/GRTKF/IC/19/12 Prov.), which will be made available, as requested by the IGC, by September 30, 2011:

“The Delegation of South Africa, on behalf of the African Group, stated that the implementation of the monitoring and reporting mechanism of the WIPO Development Agenda was an important tool. It recalled that the 2010 General Assembly approved this mechanism with a view that all relevant WIPO bodies should report on their contribution towards the implementation of the Development Agenda Recommendations. It referred in particular to Recommendation 18 that urged the Committee “to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.” It added that other relevant Recommendations included Recommendations 15, 21 and 40. It underlined that the Committee was one of the most important Committees in WIPO to the African Group, as it sought to develop an appropriate *sui generis* system for the protection of GRs, TK and TCEs. It was pleased that the Committee was currently undertaking text-based negotiations with the objective of concluding an appropriate international legal instrument or instruments for the protection of TK, TCEs and GRs. It said that the three IWG meetings assisted immensely in guiding the work of the Committee. As a result of these preparations, the 17th and 18th sessions of the Committee had been able to make significant progress on texts relating to TK and TCEs. It was, therefore, of the view that the current negotiation process was to a certain extent in line with the Development Agenda Recommendation 18. It nevertheless recalled that the Committee had not accelerated negotiations on GRs and emphasized that the Committee had spent significant time addressing objectives and principles on GRs without deciding on the eventual outcome. It requested from the Committee to decide on the

appropriate mechanism for the protection of GRs. It welcomed the efforts of the WIPO Secretariat to facilitate the registration and digitization of TK of interested Member States and took note of two recent WIPO events related to the issues, held in India and Oman respectively. It said that these events demonstrated the usefulness of registering TK and TCEs as well as the digitization of TK, adding that the development of databases and digital repositories would go a long way in complementing norm-setting on the protection of GRs, TK and TCEs. It recognized the role that WIPO played in providing IP information and advice in order to advance the negotiations of the CBD Nagoya Protocol on Access and Benefit sharing. It encouraged WIPO to continue interacting with the CBD Secretariat on the implementation of the Nagoya Protocol and also collaborate with other intergovernmental organizations in the areas of TK, TCEs and GRs. It was pleased with the participation of representatives of indigenous and local communities in the Committee's work and stated that their perspectives and contributions had enriched the negotiations. It expressed appreciation for the contributions that had been made to the Voluntary Fund for representatives of accredited indigenous and local communities as it enabled the participation of indigenous peoples and local communities in the Committee's work. It reminded the Committee that the Voluntary Fund was running out of funds and welcomed some of the suggestions made by some representatives of the indigenous peoples that the Member States and observers should consider contributing to the fund on a voluntary basis. It found the exercise of linking the work of the Committee with the Development Agenda through the Coordination Mechanism fruitful and an effective way of monitoring progress.

The Delegation of Brazil was pleased to state its views under a specific agenda item on how the Committee had been contributing to the implementation of the Development Agenda Recommendations. It expected that the same format of reporting be adopted in all relevant WIPO bodies. It recalled that the work of the Committee should be guided by the Development Agenda Recommendations, as in all relevant WIPO bodies. It added that special attention should be given to Recommendation 18 which urged the Committee to accelerate the process regarding the protection of TK, TCEs and GRs. It said that since the approval of the Development Agenda in 2007, the Committee had indeed accelerated its work, noting that the 2009 General Assembly had approved an even more ambitious mandate that instructed the Committee to undertake text-based negotiations with the view of reaching agreement on a text of an international legal instrument or instruments to ensure the effective protection of TK, TCEs and GRs. It recalled that three IWG meetings had been convened to achieve this goal and that that fifteen experts from capital from GRULAC had been financed for each IWG meeting. It nevertheless reminded that in spite of this new mandate, progress had been slow, noting that the Committee was not in a position to recommend at this meeting the convening of a Diplomatic Conference. It emphasized that in order to fulfill the recommendations of the Development Agenda it was essential not losing the 2009 ambition in the process of extending the mandate for an additional period of two years. It believed that at least the same number of meetings should be held and the same level of financing should be kept in order to show Member States' commitment to the cause of protection. It suggested that IWG be replaced by extraordinary sessions of the Committee, should the Member States find it useful. It said that it was in any event important to maintain the work between the sessions in order to keep the necessary momentum. It agreed with the Delegation of South Africa that spoke on behalf of the African Group that GRs had lagged behind. It added that special attention must be given to developing an effective work program in relation to that specific issue while renewing the mandate of the Committee.

The Delegation of the United States of America, on behalf of Group B, was pleased to contribute to the discussion on the Committee's implementation of the respective Development Agenda recommendations, specifically those in cluster B on norm-setting, flexibilities, public policy and public domain. It recognized the work with respect to WIPO

Development Agenda Recommendations 16 as well as 17, and, in particular, Recommendation 18 which directly related to the Committee. The Delegation stated that the Committee had made good progress towards fulfilling the 2009 WIPO General Assembly mandate to reach agreement on a text of an international legal instrument or instruments which would ensure the effective protection of TK, TCEs and GRs. It added that this discussion on TK, TCEs and GRs greatly contributed to the mainstreaming of the development considerations in WIPO's work. It recalled that over the past two years, options for substantive articles for TK and TCE and options for principles and objectives for GR had emerged. It said that, despite this progress, further policy reflection and consensus were required in order to provide texts which were sufficiently mature to warrant consideration by the General Assembly.

The Delegation of the European Union and its 27 Member States recognized the relevance of the work of the Committee to the implementation of the Development Agenda Recommendations. It recalled that the most recent mandate of the Committee directly corresponded with Recommendation 18, which referred to accelerating the process on the protection of TK, TCEs and GRs, without prejudice to any outcome, including the possible development of an international instrument or instruments. It believed that further and fuller assessment of the Committee's contribution to the implementation of the Development Agenda would only be possible at a later stage. It recalled that the Committee had recently seen considerable progress in the negotiations, including through the work of the IWGs in which the participation of experts had proved to be very useful. It added, however, that much substantive work still remained to be done. It was of the view that various Committee-related activities and initiatives were guided by the relevant Development Agenda Recommendations. It noted that the norm-setting activities within the Committee were member-driven and ensured a participatory process, which took into consideration the interests and priorities of all Committee's Member States as well as the viewpoints of other stakeholders, including accredited intergovernmental organizations and NGOs. This was in line with Recommendation 15. It noted as well that the norm-setting process duly considered the boundaries, role and contours of public domain in line with Recommendations 16 and 20 and was taking into account flexibilities in international IP agreements in line with Recommendation 17. It stated as well that the Committee's negotiations were based upon open and balanced consultations in line with Recommendations 21 and 42 and were supportive of the UN development goals in line with Recommendation 22. It added that the work on the protection of TK, TCEs and GRs had a potential to contribute to the mainstreaming of development considerations in WIPO's work and the understanding and use of flexibilities in line with Recommendations 12 and 14. It emphasized that the contributions to the Voluntary Fund for Accredited Indigenous and Local Communities, which facilitated participation of the observers in the IWG and the Committee's sessions, as well as activities of the Indigenous Consultative Forum and the Indigenous Panel, should be mentioned in the context of Recommendation 42 referring to wide participation of civil societies at large in WIPO activities. It concluded by appreciating the contribution made by the Committee to the implementation of the Development Agenda and looked forward to cooperating further within the Committee on the realization of the goals set out in the Development Agenda.

The Delegation of Japan supported the statement made by the United States of America on behalf of Group B. It noted that the Committee had made progress. It believed, therefore, that the Committee had been contributing to the implementation of the Development Agenda Recommendations, especially Recommendation 18. It noted that further work was needed in order to carry on the process on the protection of TK, TCEs and GRs, without prejudice to any outcome, including the possible development of an international instrument or instruments, as Development Agenda Recommendation 18 stated.

The Delegation of the Islamic Republic of Iran expressed its satisfaction with the inclusion of this agenda item, as it provided an opportunity for Member States to raise their points on the issue of development, with the hope of mainstreaming it through all the activities of WIPO. It was of the view that development objectives lay at the heart of the Committee and said that the 45 Recommendations of the WIPO Development Agenda were immediately relevant to its ongoing work. It stated that the Committee had reached a critical moment in its text-based negotiations and recalled that since 2000, the Committee had invested a lot of time and energy in its process. It requested that the Committee keep the momentum and try to solve the remaining divergences in order to be able to fulfill the long-pending aspirations of developing countries. It welcomed, therefore, the progress being made as a result of text-based negotiations and it was optimistic about the positive outcomes, that is, the enhancement of the effective use of IP principles for the legal protection of TK and TCEs, as well as equitable benefit sharing of GRs. Such a trend could move IP rights in a more balanced direction, would increase the interests of the developing countries in the IP system and, therefore, promote the legitimacy of WIPO as a UN specialized agency, which should be bound by UN development objectives. It said that the only avenue to realize these objectives was the establishment of international binding instruments to protect TK, TCEs and GRs. It expected that such an important paradigm shift in the IP regime would bring about sustainable grounds for the management of collective and individual rights in order to commercialize TK, TCEs and GRs for the benefit of its holders. It highlighted that this process could improve the enabling environment for development in developing countries and would enhance knowledge economy through the use of IP as well as increase the contribution of the developing countries in the global knowledge and global cultural partnership. It invited the Secretariat to provide technical assistance to countries in order to enable them to formulate robust national protection systems, as well as new methods for the commercialization of TK and folklore, for the benefit of their holders, in parallel with the on-going negotiations that were taking place in the Committee. It suggested that these activities be designed in the future as a project of the Committee on Development and Intellectual Property (CDIP).

The Delegation of Ecuador referred to the Annex of WIPO document WO/PBC/17/4 that contained the Draft Proposed Program and Budget for the 2012/13 Biennium, in particular to Program 11 which related to the WIPO Academy. It expressed its support for the creation of a new specialized course on TK in the framework of the Distance Learning Program of the WIPO Academy as foreseen in the draft. It said that this course would help the users, including civil society, to follow the developments of this issue in line with the Development Agenda.

The representative of Tupaj Amaru referred to the development issue as it had been addressed by the UN for the last 25 years. He considered that the Millennium Development Goals (MDGs) had not been met and had failed entirely. He said that the form of development that indigenous peoples were confronted with was neo liberal in nature and destructive of their GRs and TK. Indigenous peoples wished for a different type of development in accordance with their collective interests.”

19. *The General Assembly is invited to take note of the information contained in this document and to renew the mandate of the IGC for the 2012-2013 biennium on the terms set out in paragraph 16 above.*

[Annexes follow]

DRAFT ARTICLES ON TRADITIONAL CULTURAL EXPRESSIONS AS PREPARED AT
IGC 19 (JULY 18 to 22, 2011)

OBJECTIVES (to be discussed at a later stage)

The protection of traditional cultural expressions should aim to:

Recognize value

(i) recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation and misuse of traditional cultural expressions

(iv) provide indigenous peoples and communities and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and [derivatives] [adaptations] therefrom, and [control] ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions;

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of indigenous peoples and communities and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities and traditional and other cultural communities;

(ix) promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(x) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities;

Contribute to cultural diversity

(xi) contribute to the promotion and protection of the diversity of cultural expressions;

Promote the [community] development of indigenous peoples and communities and traditional and other cultural communities and legitimate trading activities

(xii) where so desired by [communities] indigenous peoples and communities and traditional and other cultural communities and their members, promote the use of traditional cultural expressions for [community based] the development of indigenous peoples and communities and traditional and other cultural communities, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;

Preclude unauthorized IP rights

(xii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions and [derivatives] [adaptations] thereof;

Enhance certainty, transparency and mutual confidence

(xiii) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance
- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities
- (h) Respect for customary use and transmission of traditional cultural expressions
- (i) Effectiveness and accessibility of measures for protection

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Option 1

1. Traditional cultural expressions are any form of artistic expression, tangible or intangible, in which traditional culture [and knowledge] are embodied including, but not limited to:

- (a) phonetic or verbal expressions;
- (b) musical or sound expressions;
- (c) expressions by action; and
- (d) tangible expressions of art.

2. Protection extends to traditional cultural expressions that are:

- (a) the result of creative intellectual activity;
- (b) passed from generation to generation;
- (c) distinctive of or the unique product of the cultural and social identity and cultural heritage; and
- (d) maintained, used or developed.

by the beneficiaries as set out in Article 2.

3. The terminology used to describe the protected subject matter should be determined at the national, regional, and sub regional levels.

Option 2

1. Traditional cultural expressions are any form of expressions, tangible or intangible, or a combination thereof, which are indicative of traditional culture and knowledge and have been passed on from generation to generation, including, but not limited to:

- (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (b) musical or sound expressions, such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals;
- (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, traditional sports and games, puppet performances, and other performances, whether fixed or unfixed; and
- (d) tangible expressions, such as material expressions of art, handicrafts, works of mas, architecture, and tangible spiritual forms, and sacred places.

2. Protection shall extend to any traditional cultural expression that is associated with the cultural and social identity of the beneficiaries as defined in Article 2, and is used, maintained or developed by them as part of their cultural or social identity or heritage in accordance with national law and customary practices.

3. The specific choice of terms to denote the protected subject matter should be determined by national legislation.

COMMENTARY AS PREPARED BY THE FACILITATOR

The policy approaches in the options

Article 1 was revised by the facilitator to more clearly reflect two different policy approaches to the subject matter of protection. These are reflected in two options, as follows:

- The policy approach in Option 1 is to provide a definition of TCEs and eligibility criteria that is as simple as possible, avoids debate about the content and length of the list of eligibility criteria, and leaves flexibility in national law or guidelines to list particular examples, should that be considered desirable.
- The policy approach in Option 2 is to provide a more detailed definition of TCEs and eligibility criteria that provide greater certainty as to the particular subject matter items that are protected through the listing of examples.

Comments by the facilitator

In both options the text was cleaned and simplified to:

- remove repetition in existing drafting options; and
- avoid the need to repeat the list of beneficiaries (by cross referencing to the definition of beneficiaries in Article 2, which avoids the need to repeat the list of beneficiaries).

The facilitator noted the following in relation to Option 1:

- For the sake of simplicity and building on the approach taken in the traditional knowledge (TK) text, Option 1 first provides a basic description of TCEs, followed by the eligibility criteria.
- In order to resolve the issue of the multiplicity of terms, such as “unique,” “characteristic” and “indicative,” the text borrows from the approach proposed by the Delegation of Norway in the TK text, and reads as follows: “distinctive of or the unique product of.” This provides a choice for national legislation. In Option 2, the formulation used is “characteristic of.”
- In paragraph 1, the facilitator has placed square brackets around the words “traditional knowledge” to highlight that some delegations had difficulty with a definition of TCEs that includes TK. It is suggested that this issue be worked through at a future Committee session.

In Option 2, all square brackets were removed from the lists. It may be that at a future Committee session, the proponents of the “list” approach consider if they agree with all the matters listed.

During informal consultations some delegations raised the issue of whether TCEs in the public domain, protected by an IP right or imbedded in a work protected by an IP right, should fall under the scope of the future instrument. The issue might require further consideration by the Committee.

ARTICLE 2

BENEFICIARIES

Option 1

Beneficiaries of protection for traditional cultural expressions, as defined in Article 1, are indigenous peoples/communities and local communities, who develop, use, hold and maintain the cultural expressions.

Option 2

Beneficiaries of protection of traditional cultural expressions, as defined in Article 1, are the holders of traditional cultural expressions which may include:

- (a) Indigenous communities;
- (b) local communities;
- (c) traditional communities;
- (d) cultural communities;
- (e) families;
- (f) nations;
- (g) individuals within the categories listed above; and
- (h) where traditional cultural expressions are not specifically attributable to or confined to an indigenous or local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.

Option 3

Beneficiaries of protection for traditional cultural expressions, as defined under Article 1, are indigenous peoples, local and traditional communities, including small-island states.

COMMENTARY AS PREPARED BY THE FACILITATOR

The policy approaches in the options

The facilitator's text attempts to more clearly reflect the different policy approaches to the issue of beneficiaries. These are reflected in three options, as follows:

- The policy approach in Option 1 is that the beneficiaries of protection are indigenous peoples and local communities (see drafting notes below regarding the reference to indigenous "peoples").
- The policy approach in Option 2 is that protection should go beyond indigenous peoples and local communities. There were two sets of concerns: (1) the inclusion of the TCEs of nations and (2) the inclusion of individuals or families, as the ones who maintain TCEs.
- Option 3 is an attempt to address the issues of "nations". It was not possible in the time available to determine the level of support for this option.

Comments by the facilitator

The need for clear definitions of such terms as "local community," "traditional community," "cultural community" (this could address the issue of communities in diaspora) and "nation" was raised during informal consultations held by the facilitator. Greater clarity on these definitions could reduce concerns about what was in scope and assist the Committee to agree on a definition of beneficiaries. In the time available, the facilitator was not able to draft suggestions or consider the terms defined in the Glossary, but this matter could be addressed at a future Committee session.

Given that there was widespread support for the approach of referring to the "beneficiaries as defined in Article 2" in other articles, the facilitator used a formulation of drafting which starts with "the beneficiaries of protection are..." rather than "protection shall extend to," in all options.

The facilitator noted the following in respect of Option 1:

- The proponents of the more limited definition of beneficiaries reflected in Option 1 had different views on whether to refer to "indigenous peoples" or "indigenous communities." As a placeholder, acknowledging that it was a matter that required further work to resolve, the facilitator referred to "indigenous peoples/communities" in Option 1.
- There were also different views on whether to also refer to "traditional" or "cultural" communities. The facilitator left these out of the draft, on the understanding that further work was needed on the definition of these terms, as well as concerning the term "local communities" and what it encompasses.
- In Option 1 it could be possible to remove the reference to "who develop..." because that is mentioned in Article 1. However the facilitator did not have the time to complete consultations on that point so the language remained in the draft.

In Option 2 the facilitator included individuals, and initially qualified that with "in accordance with customs of the collective." That language was not supported by the delegations wishing to include "individuals," but the concept was something that the Committee could return to.

ARTICLE 3

SCOPE OF PROTECTION

Option 1

The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, should/shall be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.

Option 2

1. Adequate and effective legal, administrative or policy measures should be provided to:
 - (a) prevent the unauthorized disclosure, fixation or other exploitation of secret traditional cultural expressions;
 - (b) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
 - (c) prevent use which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;
 - (d) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
 - (e) [there are three options for paragraph (e), which deals with commercial exploitation, ranging from the most flexible to the most prescriptive]

Alternative 1: where appropriate, enable beneficiaries to authorize the commercial exploitation of traditional cultural expressions by others.

Alternative 2: require equitable remuneration to the beneficiaries for the following uses of traditional cultural expressions:

- (i) fixation;
- (ii) reproduction;
- (iii) public performance;
- (iv) translation or adaptation;
- (v) making available or communicating to the public; and
- (vi) distribution.

Alternative 3: ensure the beneficiaries have exclusive and inalienable collective rights to authorize and prohibit the following in relation to their traditional cultural expressions:

- (i) fixation;
- (ii) reproduction;
- (iii) public performance;
- (iv) translation or adaptation;
- (v) making available or communicating to the public;
- (vi) distribution;
- (vii) any use for commercial purposes, other than their traditional use; and
- (viii) the acquisition or exercise of intellectual property rights.

COMMENTARY AS PREPARED BY THE FACILITATOR

The policy approaches in the options

The facilitator's text attempts to more clearly distil the two basic policy approaches to the issue of scope of protection:

- The policy approach underlying Option 1 is that States should have maximum flexibility to determine the scope of protection.
- The policy approach in Option 2 is more detailed and prescriptive, and contains two options within it. One prescribes the kinds of activities that should be regulated, but to leave flexibility concerning the policy measures to that effect, and the other prescribes a rights-based approach.

Comments by the facilitator

In relation to option two, the facilitator noted the following:

- There were several different formulations of elements concerning offensiveness and secret TK, among others. The facilitator tried to distil the key concepts from these. It was not possible to use the precise language put forward by all delegations but there was an attempt to reflect all the concepts. The exact wording could be a matter for the Committee to consider at a future session.
- In developing the alternatives for paragraph (e), the facilitator condensed the two parts of former Alternative 1, Article B (and the new alternative presented by the Delegation of Indonesia on behalf of the Like-Minded Countries), to avoid having two lists (one for signs, symbols, etc. and one for TCEs other than signs) and repeating the protections concerning offensive use and false representation. The remaining two matters from the second category – use for commercial purposes and acquisition of intellectual property rights – were added to the first list of exclusive rights.

Regarding the alternative for equitable remuneration, while that was in the text, the facilitator could not recall any delegation insisting on it. That alternative could be removed at a future Committee session.

ARTICLE 4

COLLECTIVE MANAGEMENT OF RIGHTS

1. The collective management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. [The beneficiaries may authorize [or to] a [designated] national competent authority [(for example, regional, national, or local)] [acting at the request, and on behalf, of the beneficiaries], in accordance with the national law / their traditional decision-making and government process / international law. Where an authorization[s] is [are to be granted] given, [by] [the] a competent authority may:
 - (a) Grant licenses only after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their traditional decision-making and governance processes;
 - (b) Collect monetary or non-monetary benefits from the use of the traditional cultural expressions providing such benefits shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits;
 - (c) [such authorizations shall/should be granted to a user by the designated competent authority [only] after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their national procedure and their customary rights [traditional decision-making and governance processes]; and
 - (d) any monetary [or] and non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions shall/should be provided directly by the designated competent authority to the beneficiaries concerned or utilized [for their benefits] for the direct benefit of relevant beneficiaries and the preservation of traditional cultural expressions.]
2. Where so requested by and in consultation with the beneficiaries, [the] a competent authority may
 - (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) establish the criteria to determine any monetary or non-monetary benefits; and,
 - (d) provide assistance in any negotiations for the use of the traditional cultural expressions.
3. [The competent authority shall report to WIPO, each year, and in a transparent way, on the distribution of benefits arising from the use of traditional cultural expressions.]
4. The management of the financial aspects of the rights 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.

ARTICLE 5

EXCEPTIONS AND LIMITATIONS

Option 1

1. Measures for the protection of traditional cultural expressions 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 member states].
2. Limitations on protection 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. Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

Alternative 1:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

Alternative 2:

- (a) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
 - (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.
4. Regardless of whether such acts are already permitted under Article 5 (3) or not, the following should be permitted:

the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation.

Option 2

1. Measures for the protection of traditional cultural expressions 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 member states].
2. Limitations on protection 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. Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

Alternative 1:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

Alternative 2:

- (a) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
- (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.

4. Regardless of whether such acts are already permitted under Article 5 (3) or not, the following should be permitted:

(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 and presentation;

(b) the creation of an original work of authorship inspired by 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 not be prohibited by the protection of traditional cultural expressions.

COMMENTARY AS PREPARED BY THE FACILITATOR

The policy approaches in the options

The facilitator's text attempts to more clearly distil the two basic policy approaches to the issue of exceptions and limitations. There are two options, as follows:

- Option 1 allows for less exceptions than Option 2, so when combined with Article 3 (on the scope of protection), it provides greater protection overall for TCEs than Option 2.
- Option 2 allows for more exceptions than Option 1, so when combined with Article 3, it provides less protection for TCEs overall than Option 1.

Comments by the facilitator

There seemed to be wide-ranging agreement on some elements of the text on exceptions, particularly: not affecting customary use, having a test for developing domestic exceptions, and having some sort of exception for cultural institutions. The criteria where there was no agreement concerned derivative works and existing exceptions under copyright and trademark law.

On the test for developing domestic exceptions, the facilitator had initially merged the two options that existed in the original text, but that was not supported by some delegations, so the criteria were separated into two alternatives.

Another sticking point was the relevance of customary or domestic law in paragraph 1. The facilitator parked that issue by square-bracketing the reference to national law to reflect that there was not agreement on that matter. During the plenary it was subsequently recalled that the informal drafting group at IGC 18 had agreed to use the term "national", so this is a matter that could be rationalized at a future meeting of the Committee.

Regarding the exception for cultural institutions, the facilitator had initially amended the paragraph to address concerns expressed by representatives of indigenous peoples that cultural institutions should not act offensively. These concerns were not widely supported, so the amendment was removed, however that approach could be taken up by the Committee at a later point.

Regarding the exception for derivative works, there had been a suggestion during the facilitator's consultations that more work be done on that issue and on what was meant by "inspired by." This could help better gauge the scope of the exception.

ARTICLE 6

TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions 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 community, indigenous peoples and communities or region to which they belong, shall last indefinitely.
3. Secret traditional cultural expressions shall continue to enjoy the protection given to disclosed traditional cultural expressions as long as they continue to meet the criteria for protection under Article 1.

Option 2

1. At least as regards the economic aspects of traditional cultural expressions, their protection should be limited in time.

ARTICLE 7

FORMALITIES

As a general principle, the protection of traditional cultural expressions shall not be subject to any formality.

ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Option 1

1. Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures [necessary] to ensure the application of this instrument.
2. Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent to further infringements.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

Option 2

1. Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions.
2. If a [designated competent authority] is appointed under Article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in Article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.
4. Where traditional cultural expressions are shared by different countries or by indigenous peoples and communities in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument.

Proposed Article 8 bis on Alternative Dispute Resolution

Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.⁴

⁴ Such as the WIPO Arbitration and Mediation Center.

ARTICLE 9

TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.

Option 1

2. The state 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 force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into 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 have the right to recover such traditional cultural expressions.

ARTICLE 10

RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

Option 1

Protection for a traditional cultural expression in accordance with [these provisions] this instrument [does not replace and] is complementary to protection and measures that apply to that expression and derivatives/adaptations thereof in accordance with international law under international intellectual property instruments as well as other relevant legal instruments and [programs] plans of action for the safeguarding, preservation, promotion of cultural heritage and the diversity of cultural expressions.

Despite what is stipulated in this option / anything to the contrary, traditional cultural expressions should be protected without time limit for the safeguard of the tangible and intangible cultural heritage of indigenous peoples.

Option 2

Protection under this instrument should leave intact and should in no way affect the protection provided for in international legal instruments on intellectual property rights. Consequently, no provision of this instrument may be interpreted as prejudicing such protection.

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 should be available to all eligible beneficiaries who are nationals or residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should 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.

[Annex B follows]

DRAFT ARTICLES ON TRADITIONAL KNOWLEDGE AS PREPARED AT IGC 19
(JULY 18 to 22, 2011)

POLICY OBJECTIVES (to be discussed at a later stage)

The protection of traditional knowledge should aim to:

[Recognize value

(i) recognize the [holistic] 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 important for indigenous and local communities and have equal scientific value as other knowledge systems;

Promote respect

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders 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; and for the contribution which traditional knowledge holders 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, respect their rights as holders and custodians of traditional knowledge, 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;

Promote conservation and preservation of traditional knowledge

(iv) promote and support the conservation and preservation of 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 of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

(v) be undertaken in a manner that empowers traditional knowledge holders 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 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 traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

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 practices, norms, laws and understandings of traditional knowledge holders, 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 of that knowledge;

Repress [unfair and inequitable uses] misappropriation and misuse

(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of 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, reward and protect tradition based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and [traditional] local communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) ensure the use of traditional knowledge with prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

Promote equitable benefit sharing

(xii) promote 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] ;

Promote community development and legitimate trading activities

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community based development, recognizing the rights of traditional 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 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 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];

Enhance transparency and mutual confidence

(xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders 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].]

(i) recognize the holistic 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 of traditional knowledge;

(iv) promote conservation and preservation of traditional knowledge;

(v) support traditional knowledge systems;

(vi) repress unfair and inequitable uses of traditional knowledge;

(vii) operate consistently with relevant international agreements and processes;

(viii) promote the fair and equitable sharing of benefits arising from the use of traditional knowledge;

(ix) enhance transparency and mutual confidence in relations between traditional knowledge holders 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.

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

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 to the [needs and expectations of] rights and needs identified by traditional knowledge holders

(b) Principle of recognition of rights

(c) Principle of effectiveness and accessibility of protection

(d) Principle of flexibility and comprehensiveness

(e) Principle of equity and benefit sharing

(f) Principle of consistency with existing legal systems governing access to associated genetic resources

(g) Principle of respect for and cooperation with other international and regional instruments and processes

(h) Principle of respect for customary use and transmission of traditional knowledge

(i) Principle of recognition of the specific characteristics of traditional knowledge

(j) Principle of providing assistance to address the needs of traditional knowledge holders

ARTICLE 1

SUBJECT MATTER OF PROTECTION

DEFINITION OF TRADITIONAL KNOWLEDGE

Option 1

1.1 For the purposes of this instrument, the term “traditional knowledge” refers to the know-how, skills, innovations, practices, teachings and learning, resulting from intellectual activity and developed within a traditional context.

Option 2

1.1 Traditional knowledge is knowledge that is dynamic and evolving, resulting from intellectual activities which is passed on from generation to generation and includes but is not limited to know-how, skills, innovations, practices, processes and learning and teaching, that subsist in codified, oral or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with biodiversity, traditional lifestyles and natural resources.

CRITERIA FOR ELIGIBILITY

Option 1

1.2 Protection extends to traditional knowledge that is:

- (a) the unique product of or is distinctively associated with beneficiaries as defined in Article 2;
- (b) collectively generated, shared, preserved and transmitted from generation to generation; and
- (c) integral to the cultural identity of beneficiaries as defined in Article 2; /

Alternative

(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time with prior informed consent;

or

(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time;

(e) not in the public domain;

(f) not protected by an intellectual property right; and

(g) not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.

Option 2

1.2 Protection under this instrument shall extend to traditional knowledge that is generated, preserved and transmitted from generation to generation and identified or associated or linked with the cultural identity of beneficiaries, as defined in Article 2.

COMMENTARY ON ARTICLE 1 BY THE FACILITATORS

Option 1: Policy approach

This option contains a simple, narrower definition of TK, along with a more detailed list of eligibility criteria.

Option 2: Policy approach

This option contains a more detailed and open-ended definition of TK.

However, the specific choice of terms to denote the protected subject matter is left to be determined by national/domestic law.

This option also includes a reference to sacred or secret TK.

Comments on policy approach

With the aim to clean the text, both options exclude any elements that define what a beneficiary is. This issue is left in its entirety to Article 2.

In light of comments received, the facilitators kept those two issues that deal with secret and sacred TK.

Some delegations have expressed a desire to include a definition of secret TK. However, some delegations wondered what the boundaries of sacred TK were, and whether this issue should be addressed by this kind of instrument.

Comments on Article 1.2

The text has been streamlined into two options.

Option 1 maintains the concepts “distinctively”, “collectively” and “cultural identity”. The other concepts (such as the public domain and TK that is not widely known or used, including as alternatives, need further discussion.

ARTICLE 2

BENEFICIARIES OF PROTECTION

Option 1

Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples/communities and local communities.

Option 2

Beneficiaries of protection of traditional knowledge, as defined in Article 1, may include:

- (a) indigenous peoples/communities;
- (b) local communities;
- (c) traditional communities;
- (d) families;
- (e) nations;
- (f) individuals within the categories listed above; and
- (g) where traditional knowledge is not specifically attributable or confined to an indigenous peoples or local community, or it is not possible to identify the community that generated it, any national entity determined by domestic law.

COMMENTARY ON ARTICLE 2 BY THE FACILITATORS

Option 1: Policy approach

In this option, “beneficiaries” are indigenous and local communities.

Option 2: Policy approach

In this option, “beneficiaries” include families, nations, and individuals. This option reflects the position of countries that do not use the term indigenous peoples or local communities but consider that individuals or families maintain TK.

Comments on policy approach

The facilitators believe that the term “beneficiaries” merits a parallel discussion in the TCE and the TK texts.

As a placeholder, the facilitators have reflected in this draft the same texts that have been presented by the TCE facilitator.

Option 1 contains the core types of beneficiaries. Option 2 contains additional types of beneficiaries that will require further discussion.

ARTICLE 3
SCOPE OF PROTECTION

Option 1

3.1 Adequate and effective legal, policy or administrative measures should be provided, as appropriate and in accordance with national law, to:

- (a) prevent the unauthorized disclosure, use or other exploitation of [secret] traditional knowledge;
- (b) where traditional knowledge is knowingly used outside the traditional context:
 - (i) acknowledge the source of traditional knowledge and attribute its holders 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 holders.
- (c) encourage traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.

Optional addition

3.2 Beneficiaries, as defined in Article 2, should, according to national law, have the following exclusive rights:

- (a) enjoy, control, utilize, maintain, develop, preserve and protect their traditional knowledge;
- (b) authorize or deny the access and use of their traditional knowledge;
- (c) have a fair and equitable share of benefits arising from the commercial use of their traditional knowledge based on mutually agreed terms;
- (d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the establishment of mutually agreed terms;
- (e) prevent the use of traditional knowledge without acknowledgment and attribution of the origin of their traditional knowledge and its holders, where known; and
- (f) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders.

Option 2

3.1 Member States shall ensure, that the beneficiaries, as defined in Article 2, have the following exclusive collective rights to:

- (a) enjoy, utilize, maintain, develop, preserve, protect and exclusively control their traditional knowledge;

- (b) authorize or deny the access and use of their traditional knowledge;
- (c) have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms;
- (d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the prior and informed consent of the holders and the establishment of mutually agreed terms;
- (e) require, in the application for intellectual property rights involving the use of their traditional knowledge, 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 domestic law or requirements of the country of origin;
- (f) prevent the use of traditional knowledge without acknowledging the source and origin of that traditional knowledge and its holders, where known;
- (g) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders.

3.2 For the purposes of this instrument, the term “utilization” in relation to traditional knowledge 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.

3.3 Member States shall provide adequate and effective legal measures to:

- (a) ensure the application of the aforementioned rights, taking into account applicable domestic law and customary practices;
- (b) prevent the unauthorized disclosure, use or other exploitation of traditional knowledge;
- (c) where traditional knowledge is knowingly used outside the traditional context:
 - (i) acknowledge the source of traditional knowledge and attribute its holders 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 holders;

- (iii) encourage, where the traditional knowledge is secret or is not widely known, traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.

COMMENTARY ON ARTICLE 3 BY THE FACILITATORS

General comments

Article 3, which relates to the scope of protection, proved to be particularly challenging to untangle. The facilitators approached this by isolating on the one hand the rights of the holders of TK, and on the other, the measures to be taken in relation to the protection of TK such as misappropriation.

Informal consultations have confirmed that although the facilitators' text will be helpful to the IGC, if only because it eliminates overlap and repetition, it still falls short in drawing clear linkages between the problems related to the protection of TK, and the possible measures to be taken to address these problems.

One suggestion put forward is to restructure the text further by clustering the current provisions under four broad approaches: a rights-based approach; a broad and flexible framework; targeted provisions for the protection of secret TK; and a mixed approach. The co-facilitators consider this suggestion to be interesting and encourage the IGC to consider it as it moves forward on this important pillar. They also recommend keeping in the text the definition of utilization, recognizing that a later stage in the discussion, the IGC may wish to create a separate section in the body of the text containing all definitions.

Option 1: Policy approach

The policy approach underlying this option is that Member States should have maximum flexibility to define the scope of protection (responsibilities of Member States and, in the alternative, the rights of the TK holders).

Option 2: Policy approach

This policy approach is more detailed and prescriptive, and is a rights-based approach with stronger obligations for Member States.

Comments on policy approach

For the purposes of this article, the facilitators have distinguished the rights given by the instrument to the TK holders and the actions to be taken by Member States to support those rights.

Comments on Article 3.1

In Option 1, the facilitators have created two sub-options. The first one contemplates measures to be taken by Member States, while Option 2 contemplates rights to be provided to beneficiaries, in addition to the aforementioned measures. This mirrors used in the TCE facilitators' text.

Facilitators have used the term Member States as to avoid pre-judging the nature of this instrument

Regarding sub-paragraph e) under option 2, the facilitators wonder whether this should be a right given to TK holders or, rather, an obligation for Member States like under option 1.

Regarding the country of origin, the facilitators wondered whether it was the country of origin of the TK or of the holders of the TK.

The facilitators have suggested to move suggested 3.4 to article 6 since it refers to exclusions.

The paragraph referring to the principles of the right to self-determination was removed as the facilitators felt it did not deal with scope of protection, and would be more appropriate under principles and objectives.

For paragraph 3.2 under Option 3, the facilitators were unsure as to the intent of the proposed paragraph and did not include it in the two options.

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

4.1 States should / Member States [Contracting Parties shall [undertake to]] adopt, [[as appropriate and] in accordance with their legal systems], the measures necessary to ensure the application of this instrument.

[Option 1

4.2 Member States shall [/should] ensure that enforcement procedures are available under their laws against the [willful or negligent] infringement of the protection provided to traditional knowledge under this instrument sufficient to constitute a deterrent to further infringements.

Option 2

4.2 Contracting Parties undertake to implement the mechanism.

Accessible, appropriate and adequate criminal, civil and administrative enforcement procedures and dispute resolution mechanisms, border measures, sanctions and remedies, shall [should] be available in cases of breach of the protection of the traditional knowledge so as to permit effective action against any act of infringement [misappropriation or misuse] of traditional knowledge, including expeditious remedies which would constitute a deterrent to further infringement [misappropriation or misuse].

4.3. These procedures should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for holders of traditional knowledge. [They should also provide safeguards for legitimate third party interests and the public interests.]

4.4 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge the parties may agree to [each party may [shall] be entitled] to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law that is most suited to the holders of traditional knowledge. The dispute resolution mechanism between beneficiaries and users should be assigned to national law when beneficiaries and users are from one country.

4.5 To promote relevant measures for the carrying-out of cultural expertise, that take into consideration customary laws, protocols and community procedures for the purposes of dispute settlement.

Option 3

4.1 Appropriate legal, policy and/or administrative measures should be provided to ensure the application of this instrument, including measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent. Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.

4.2 The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

4.3 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge each party shall be entitled to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law.]

ARTICLE 5

ADMINISTRATION OF RIGHTS

The establishment of a national or regional authority or authorities under this article is without prejudice to the national law and the right of traditional knowledge owners to administer their rights according to their customary protocols, understandings, laws and practices.

In the case that the Member State decides thus that they should establish this authority:

5.1 A Member State [contracting party] shall [may] free, prior and informed consent of [, in consultation with] the owners [holders] of traditional knowledge in accordance with its national law, may establish or appoint an appropriate national or regional competent authority or authorities. The functions may include, but need not be limited to, the following:

Alternative

Where so requested by traditional knowledge holders a competent authority (regional, national or local) may to the extent authorized by the holders:

- (a) disseminate [disseminating] information and promoting practices about traditional knowledge and its protection under protection of its beneficiaries;
- (b) ascertaining whether free, prior informed consent has been obtained;

Alternatives

(b) providing advice to traditional knowledge holders and users on the establishment of mutually agreed terms.

(b) applying the rules and procedures of the national legislation regarding prior and informed consent and to the fair and equitable sharing of benefits.

[(c) supervising fair and equitable benefit-sharing; and]

(d) assist [assisting], where possible and appropriate, the owners [holders] of traditional knowledge in the use, practice [exercise] and enforcement of their rights over their traditional knowledge.

(e) determine whether an act pertaining to traditional knowledge constitutes an infringement or another act of unfair competition in relation to that knowledge.

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 owners [holders] where possible, administer the rights of that traditional knowledge.

5.3 The identity of the [competent] national or regional authority or authorities shall [/should] be communicated to the World Intellectual Property Organization.

5.4 [The establishment of a national or regional authority or authorities under this article is without prejudice to the national law and the right of traditional knowledge owners [holders] to administer their rights according to their customary protocols, understandings, laws and practices.]

5.5 The established authority shall include authorities originating from indigenous peoples so that they form part of that authority

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

Option 1

6.1 Measures for the protection of traditional knowledge should not restrict, according to domestic/national law, the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context.

6.2 Limitations on protection should extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge:

Alternative

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the beneficiaries, provided that the use of traditional knowledge:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

Alternative

(a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and

(b) does not unreasonably prejudice the legitimate interests of the beneficiaries.

6.4 Regardless of whether such acts are already permitted under Article 6.2 or not, the following shall be permitted:

(a) the use of traditional knowledge in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation should be permitted; and

(b) the creation of an original work of authorship inspired by traditional knowledge.

6.5 There shall be no right to exclude others from using knowledge that:

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

6.6 [Secret and sacred traditional knowledge should not be subjected to exceptions and limitations.]

Option 2

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 [consistent with national/domestic laws of the Member States].

6.2 Limitations on protection shall extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge:

Alternative

6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the beneficiaries, provided that the use of traditional knowledge:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

Alternative

- (a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and
- (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.

6.4 [Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.]

COMMENTARY ON ARTICLE 6 BY THE FACILITATORS

Comments

Language was proposed in plenary to the effect that “[t]he independent discovery or the independent innovation is based on traditional knowledge, exemptions and limitations should be over traditional knowledge with country of origin.” The facilitators chose not to include that language until clarification is obtained from its proponents.

During informal consultations, some delegations questioned whether secret and/or sacred TK should be included within the scope of this future instrument. All recognized that further discussion was required on this important issue. In the meantime, the facilitators have chosen to keep the language related to secret and/or sacred TK in the text.

ARTICLE 7

TERM OF PROTECTION

[Option 1

Protection of traditional knowledge shall [should] last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 1.]

[Option 2

Duration of protection of traditional knowledge varies based upon the characteristics and value of traditional knowledge.]

ARTICLE 8
FORMALITIES

Option 1

8.1 The protection of traditional knowledge should [shall] not be subject to any formality.

Option 2

8.1 The protection of traditional knowledge requires some formalities.

[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.]

[ARTICLE 9

TRANSITIONAL MEASURES

9.1 These provisions apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article 1.

Option 1

9.2 The state should ensure the necessary measures to secure the rights [acknowledged by national [or] domestic law,] already acquired by third parties in accordance with its national law and its international legal obligations.

Option 2

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].]

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Option 1

[10.1 Protection under this instrument shall take account of, and operate consistently with, other international [and regional and national] instruments [and processes] [, 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].]

Option 2

[10.1 [Protection under this instrument should leave intact] and should in no way affect the rights or the protection provided for in international legal 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].]

[10.2 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.]

Alternative

10.2 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.

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 be available to all eligible beneficiaries who are nationals or residents of a Member State [prescribed country] as defined by international obligations or undertakings. Eligible foreign beneficiaries should 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.]

National treatment as to all domestic law or national treatment as to laws specifically identified to fulfill these principles; or

Reciprocity; or

An appropriate means of recognizing foreign rights holders.

ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional knowledge is located in territories of different States / Member States [contracting Parties], those States / Member States [contracting Parties] should [shall] co-operate 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 consent] / [and prior informed consent] of the traditional knowledge owners [holders].

Parties shall 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.

[Annex C follows]

DRAFT OBJECTIVES AND PRINCIPLES RELATING TO INTELLECTUAL PROPERTY AND
GENETIC RESOURCES AS PREPARED AT IGC 19 (JULY 18 to 22, 2011)

OBJECTIVE 1

Ensure [that] those accessing [and/or using] genetic resources [, their derivatives] and associated traditional knowledge [in particular applicants for intellectual property rights] comply with national law and [requirements¹ of the country providing² for prior informed consent, mutually agreed terms, fair and equitable] benefit-sharing [and disclosure of origin.]

PRINCIPLES OF OBJECTIVE 1

Principle 1

Recognize the wide variety of ownership arrangements pertaining to genetic resources [, their derivatives] and associated traditional knowledge, including the sovereign rights of States, the rights of indigenous peoples and local communities, as well as private property rights.

Principle 2

Ensure respect for the principle of self determination of indigenous peoples and local communities, including peoples partially or entirely under occupation and their rights over genetic resources and associated traditional knowledge, including the principles of prior informed consent, mutually agreed terms, and full and effective participation, noting the United Nations Declaration on the Rights of Indigenous Peoples.

¹ National law and requirements include customary norms.

² Country providing is the country of origin or that has acquired the genetic resources / with traditional knowledge in accordance with the CBD.

OBJECTIVE 2

Option 1

Prevent [intellectual property rights] [patents] involving the access and utilization of genetic resources, [their derivatives] and associated traditional knowledge from being granted [in bad faith]

- [in error for inventions that are not novel or inventive]
- [where there is no prior informed consent, mutually agreed terms and/or fair and equitable benefit-sharing, and disclosure of origin]

or

- [or that was granted in violation of the inherent rights of the original owners]

Option 2

Ensure that no patents on life and life forms are granted for genetic resources and associated traditional knowledge.

PRINCIPLES OF OBJECTIVE 2

Principle 1

Patent applicants should not receive exclusive rights on inventions that are not new or inventive.

Principle 2

Option 1

The patent system should provide certainty of rights for legitimate users of genetic resources [and their derivatives] and associated traditional knowledge.

Option 2

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

The intellectual property system must provide for mandatory disclosure requirements ensuring that the intellectual property offices become key checkpoints for disclosure and monitoring the utilization of genetic resources, their derivatives and/or associated traditional knowledge.

Administrative and/or judicial authorities shall have the right to (a) prevent the further processing of the intellectual property applications or (b) prevent the granting of intellectual property rights, as well as (c) revoke intellectual property rights subject [to judicial review] / to Article 32 of the TRIPS Agreement and render unenforceable intellectual property rights when the applicant has either failed to comply with the objectives and principles or provided false or fraudulent information.

Principle 3

Intellectual property rights applicants should not receive exclusive rights where free, prior and informed consent and fair and equitable benefit-sharing requirements for accessing and using genetic resources [and their derivatives] [and their associated traditional knowledge] have not been met [ensuring free prior informed consent and fair and equitable benefit-sharing for indigenous peoples and local communities].

Principle 4

Persons applying for intellectual property rights involving the use of genetic resources and/or associated traditional knowledge have a duty of good faith and candor to disclose in their applications all background information relating to the genetic resources and associated traditional knowledge, including the country of source or origin.

OBJECTIVE 3

Ensure that intellectual property [Patent] offices have appropriate information on genetic resources, [their derivatives] and associated traditional knowledge needed to make proper and informed decisions in granting intellectual property rights [patents]. [Such information shall include confirmation through the mandatory disclosure requirements that prior informed consent has been obtained and access has been granted on mutually agreed terms which can be made through an internationally recognized certificate of compliance.]

PRINCIPLES OF OBJECTIVE 3

Principle 1

Intellectual property [Patent] offices should [must] consider all relevant prior art [as far as known to the applicant] relating to genetic resources, [their derivatives] and associated traditional knowledge when assessing the eligibility for grant of intellectual property rights [a patent].

Principle 2

[Intellectual property [Patent] applicants should disclose all background information of genetic resources, their derivatives and associated traditional knowledge relevant for determining the eligibility conditions.]

Principle 3

There is a need to recognize that some holders of traditional knowledge may not want their knowledge documented.

OBJECTIVE 4

Establish a coherent and mutually supportive [system] relationship between intellectual property rights involving the utilization of genetic resources, their [derivatives] and/or associated traditional knowledge and existing international and regional agreements and treaties, [including ensure consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples]

PRINCIPLES OF OBJECTIVE 4

Principle 1

Promote respect for and seek consistency with other international and regional instruments and processes.

Principle 2

Promote cooperation [awareness and information sharing] with relevant international and regional instruments and processes [and support, in particular, the implementation of the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity.]

OBJECTIVE 5

Recognize and maintain the role of the intellectual property system in promoting innovation, transfer and dissemination of technology, to the mutual advantage of holders and users of genetic resources, their [derivatives] and associated traditional knowledge in a manner conducive to social and economic welfare [while]:

- [contributing to the protection of genetic resources, [their derivatives] and associated traditional knowledge.]
- [preventing the adverse effects of the intellectual property system on the indigenous peoples' customs, beliefs and rights with the aim of recognizing and protecting the rights of indigenous peoples to use, develop, create and protect their knowledge and innovation in relation to genetic resources.]

PRINCIPLES OF OBJECTIVE 5

Principle 1

Option 1

Maintain the incentives for innovation provided by the intellectual property system.

Option 2

Recognize and maintain the role of the intellectual property system in promoting innovation, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and in the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and fair and equitable sharing of benefits arising from their use.

Principle 2

Promote certainty and clarity of intellectual property rights [, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and obligations with respect to the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit-sharing.

Protect creativity, reward investments and ensure prior informed consent and fair and equitable benefit-sharing with the knowledge holders.]

Principle 3

Protect creativity and reward investments made in developing a new invention.

Principle 4

Promote transparency and dissemination of information [, where not in contrast with public morality and/or ordre public,] by:

- [publishing and disclosing technical information related to new inventions, so as to enrich the total body of technical knowledge accessible to the public.
- [disclosing country of origin and publishing and disclosing technical information related to new inventions, where appropriate and where publicly available, so as to enrich the total body of technical knowledge accessible to the public.]
- [increase legal certainty and trust between users and providers of genetic resources and traditional knowledge through a mandatory disclosure of origin or source.]

[End of Annex C and of document]