

## **WIPO General Assembly**

### **Forty-Sixth (25<sup>th</sup> Extraordinary) Session Geneva, September 22 to 30, 2014**

#### **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 Forty-Third (21<sup>st</sup> Ordinary) Session in September 2013 agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2014/2015 biennium.
2. The IGC's mandate for the 2014/2015 biennium, which was set out in document WO/GA/43/22, provides as follows:

“Bearing in mind the Development Agenda recommendations and acknowledging the progress made, 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 2014/2015, and without prejudice to the work pursued in other fora, continue to expedite its work with open and full engagement, on text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.

“(b) The Committee will follow, as set out in the table below, a clearly defined work program, based on sound working methods, for the 2014/2015 biennium. This work program will make provision for three sessions of the IGC in 2014, including thematic and cross cutting/stocktaking sessions. At the beginning of IGC 26 an Ambassadorial/Senior Capital-Based Officials meeting will be held to share views on key policy issues relating to the negotiations, to further inform/guide the process. The IGC may decide to hold further Ambassadorial/Senior Capital-Based Officials meetings during future IGC meetings.

“(c) The focus of the Committee’s work in the 2014/2015 biennium will build on the existing work carried out by the Committee and use all WIPO working documents, including WIPO/GRTKF/IC/25/5, WIPO/GRTKF/IC/25/6 and WIPO/GRTKF/IC/25/7 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 2014 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. With a view to finalising the text(s) within the biennium, the General Assembly in 2014 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.

“The General Assembly takes note of the possibility for members of the IGC to request studies or to provide examples to inform the discussion of objectives and principles, and each proposed article, including examples of protectable subject matter and subject matter that is not intended to be protected, and examples of domestic legislation. However, examples and studies are not to delay progress or establish any preconditions to the text-based negotiations.

Indicative Dates	Activity
February 2014	<p data-bbox="758 1424 917 1458">IGC 26 GR.</p> <ul data-bbox="710 1496 1332 1637" style="list-style-type: none"> <li data-bbox="710 1496 1332 1637">• Ambassadors/Senior Capital-Based Officials meeting to share views on key policy issues relating to the negotiations on GRTKTCE, to further inform/guide the process.</li> </ul> <p data-bbox="742 1675 965 1709">Duration half day</p> <ul data-bbox="710 1747 1380 1850" style="list-style-type: none"> <li data-bbox="710 1747 1380 1850">• Undertake text-based negotiations on GR with a focus on considering options for a draft legal text -</li> </ul> <p data-bbox="734 1816 1117 1850">Duration four and a half days.</p> <p data-bbox="742 1888 949 1921">Duration 5 days</p>

April 2014	<p>IGC 27 TK followed by TCE.</p> <ul style="list-style-type: none"> <li>• Consideration of Cross Cutting TK/TCE Issues, duration 1 day</li> <li>• TK - Focus on objectives, principles, 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions, duration 4 days</li> <li>• Consideration of Cross Cutting TK/TCE Issues, duration 1 day</li> <li>• TCE - Focus on objectives, principles, 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions, duration 4 days</li> </ul> <p>Duration 10 days</p>
July 2014	<p>IGC 28 Cross-cutting session/Stocktaking.</p> <ul style="list-style-type: none"> <li>• Cross Cutting GR/TK/TCE session.</li> <li>• Take stock of progress and make a recommendation to the General Assembly</li> </ul> <p>Duration 3 days</p>
September 2014	<p>WIPO General Assembly</p> <p>With a view to finalising the text(s) within the biennium, the General Assembly in 2014 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.”</p>

### IGC SESSIONS IN 2014

3. Pursuant to the mandate for the 2014/2015 biennium and the work program for 2014, the IGC met three times in 2014, as follows:

- (a) IGC 26, from February 3 to 7, 2014, on the subject of genetic resources (GRs);
- (b) IGC 27, from March 24 to April 4, 2014, on the subjects of traditional knowledge (TK) and traditional cultural expressions (TCEs); and,
- (c) IGC 28, from July 7 to 9, 2014, for a cross-cutting review on GRs, TK and TCEs, and taking stock of progress made and making a recommendation to the General Assembly.

4. Paragraph (d) of the mandate for this biennium (quoted above) requests the IGC to “submit to the 2014 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. With a view to finalizing the text(s)

within the biennium, the General Assembly in 2014 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”.

5. In this regard, the three sessions of the IGC that took place in 2014 took the following decisions:

(a) IGC 26 (GRs): “The Committee developed, on the basis of document WIPO/GRTKF/IC/26/4, a ‘Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2’. The Committee decided that this text, as at the close of the session on February 7, 2014, be transmitted to the WIPO General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross-cutting issues at the Twenty-Eighth session of the Committee, taking place in July 2014, in accordance with the Committee’s mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22. The Committee also took note of documents WIPO/GRTKF/IC/26/5, WIPO/GRTKF/IC/26/6, WIPO/GRTKF/IC/26/INF/7, WIPO/GRTKF/IC/26/INF/8 and WIPO/GRTKF/IC/26/INF/9.”<sup>1</sup>

(b) IGC 27 (TK and TCEs): Regarding TK, “[t]he Committee developed, on the basis of document WIPO/GRTKF/IC/27/4, a further text, ‘The Protection of Traditional Knowledge: Draft Articles Rev. 2’. The Committee decided that this text, as at the close of this agenda item on March 28, 2014, be transmitted to the WIPO General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross cutting issues at the Twenty Eighth session of the Committee, taking place in July 2014, in accordance with the Committee’s mandate for 2014 2015 and the work program for 2014, as contained in document WO/GA/43/22. The Committee also took note of documents WIPO/GRTKF/IC/27/6, WIPO/GRTKF/IC/27/7, WIPO/GRTKF/IC/27/8, WIPO/GRTKF/IC/27/INF/7, WIPO/GRTKF/IC/27/INF/8, WIPO/GRTKF/IC/27/INF/9, WIPO/GRTKF/IC/27/INF/10 and WIPO/GRTKF/IC/27/INF/11.”<sup>2</sup> Regarding TCEs, “[t]he Committee developed, on the basis of document WIPO/GRTKF/IC/27/5, a further text, ‘The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2’. The Committee decided that this text, as at the close of this agenda item on April 4, 2014, be transmitted to the WIPO General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross-cutting issues at the Twenty-Eighth session of the Committee, taking place in July 2014, in accordance with the Committee’s mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22. The Committee also took note of documents WIPO/GRTKF/IC/27/INF/7, WIPO/GRTKF/IC/27/INF/8, WIPO/GRTKF/IC/27/INF/9 and WIPO/GRTKF/IC/27/INF/10.”<sup>3</sup>

(c) IGC 28: “The Committee took note of and discussed the cross-cutting elements of the texts contained in the annexes to documents WIPO/GRTKF/IC/28/4, WIPO/GRTKF/IC/28/5 and WIPO/GRTKF/IC/28/6, and confirmed that these texts, as developed during the Twenty-Sixth and Twenty-Seventh sessions of the Committee respectively, be transmitted to the WIPO General Assembly taking place in September 2014, in accordance with the Committee’s mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22. The Committee also took note of documents WIPO/GRTKF/IC/28/7, WIPO/GRTKF/IC/28/8, WIPO/GRTKF/IC/28/9, WIPO/GRTKF/IC/28/INF/7, WIPO/GRTKF/IC/28/INF/8, WIPO/GRTKF/IC/28/INF/9 and WIPO/GRTKF/IC/28/INF/10. Regarding the requirement to take stock of progress made and make a recommendation to the General Assembly, the Committee decided that

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<sup>1</sup> WIPO/GRTKF/IC/26/8, paras 162 - 163

<sup>2</sup> WIPO/GRTKF/IC/27/10 Prov. 2, paras 182 - 183

<sup>3</sup> WIPO/GRTKF/IC/27/10 Prov. 2, paras 286 - 287

statements made on this matter during the final discussion in the Twenty-Eighth session under this agenda item on Wednesday, July 9, 2014, be recorded in the report of the Committee and that those statements be transmitted to the WIPO General Assembly taking place from September 22 to 30, 2014, for its consideration, and be included in the usual report of the session.”<sup>4</sup>

6. This document accordingly encloses the three texts referred to in the above decisions, namely “Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2” (Annex A), “The Protection of Traditional Knowledge: Draft Articles Rev. 2” (Annex B), and “The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2” (Annex C).

7. Pursuant to the decision of IGC 28 referred to in paragraph 5(c) above, the following interventions were made “regarding the requirement to take stock of progress made and make a recommendation to the General Assembly, [...] during the final discussion in the Twenty-Eighth session [...] on Wednesday, July 9, 2014”:

The Delegation of Kenya, speaking on behalf of the African Group, noted that substantial progress had been made in all three texts to enable the IGC to make a recommendation to the General Assembly in 2014 to convene a diplomatic conference in 2015. The current mandate called upon the IGC to finalize the text(s) of the international instrument(s) within the biennium. Furthermore, the General Assembly in 2014 would take stock of and consider the texts, progress made and decide on convening a diplomatic conference and would consider the need for additional meetings, taking into account the budgetary process. The Delegation said that it had remained constructive in both the plenary and informal consultations and was committed to concluding the work as per the mandate. It noted that the IGC mandate was not an open one but a closed one, which required renewal every biennium. In that regard, the current mandate would end in August 2015, before the 2015 General Assembly and, therefore, the IGC could not take a decision beyond its mandate. For that reason, it was of the firm view that any decision the IGC would take had to be confined within the ambit of the current mandate. From a logical and sequential perspective therefore, the first issue to be dealt with was to take stock so as to be able to assess the progress achieved in the texts. Stock-taking was a critical exercise as it clearly showed where there was consensus and where there were difficulties. That would help inform future work and also refocus energies and give a clear picture of the work needed to be undertaken, as well as the amount of time necessary to take the IGC to a logical conclusion. Based on the results of the stock-taking exercise, the IGC would be able to take the steps to conclude the work in an objective, clear and purposeful manner. In that regard, the Delegation was of the view that the texts were mature and made the following recommendation to the General Assembly: Convene a diplomatic conference in 2015 and provide for three sessions, and a possible fourth intersessional meeting, to further refine the texts in advance of the diplomatic conference. The sessions would follow a clearly defined work plan as set out in the program that would be submitted to the Secretariat in writing. It envisaged a diplomatic conference in November 2015 and, therefore, the work program would be geared towards that goal. [Note from the Secretariat: the following was the written statement as received from the Delegation of Kenya on behalf of the African Group]:

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<sup>4</sup> Decision on Agenda item 6 of Decisions of the Twenty-Eighth Session of the Committee, see [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=280096](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=280096)

**African Group Recommendation and Work Program to the WIPO General Assemblies in September 2014 on the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**Mandate of the IGC 2014/2015**

Submit to the 2014 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protections of GRs, TK and TCEs. With a view to finalize the text(s) within the biennium, the General Assembly in 2014 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.

In accordance with this IGC Mandate for 2014/2015, the African Group makes the following recommendations to WIPO General Assemblies in September 2014;

**African Group Recommendation to the WIPO General Assembly;**

**Convene a diplomatic conference in 2015, and provide three sessions, and a possible fourth inter-sessional meeting, to further refine the texts in advance of the diplomatic conference. The sessions will follow a clearly defined work plan as set out in the table below, based on sound working methods.**

Dates	Activity
September 2014	WIPO General Assemblies  Approves the Recommendation to convene a diplomatic conference in November 2015
February 2015	IGC 29 TK followed by TCE.  <ul style="list-style-type: none"> <li>• Continue text based negotiations on TK; 5 days.</li> <li>• Continue text based negotiations on TCE; 5 days.</li> </ul> Duration 10 Days
April 2015	IGC 30 GR  <ul style="list-style-type: none"> <li>• Continue text-based negotiations on GR</li> </ul> Duration 5 days
May 2015	IGC 31 Cross Cutting/Stocktaking Session GR/TK/TCE  Duration 5 days
November 2015	Diplomatic conference to conclude an International Legal Instrument(s) for Effective Protection of GRs, TK, and TCEs

The Delegation of Bangladesh, speaking on behalf of the Asia and Pacific Group, regretted the fact that the IGC could not reach a consensus on recommendations to the

General Assembly. However, it proposed the following recommendations: 1. The General Assembly would decide to convene a diplomatic conference as soon as possible after taking stock of the progress. 2. There would be at least 18 days for IGC sessions in 2015. If there was to be a back-to-back session of 10 days, first on TK and then on TCEs, then it recommended three sessions, the first being one of 10 days on TK and TCEs combined, the second one on GRs for five days and the third one for discussing cross-cutting issues and stock-taking for three days. However, if there were several sessions for TK and TCEs, then there would be four sessions, five days for each GRs, TK and TCEs and a three-day session for cross-cutting issues and stock taking. 3. There should be a senior officials' meeting during the last three-day session.

The Delegation of Japan, speaking on behalf of Group B, thanked the Friend of the Chair for his hard work on the issue. Although the IGC could unfortunately not reach agreement on the work program for 2015, it had had a good discussion under the guidance of the Friend of the Chair, and had reached a good framework for the work program, although different views still remained on issues of detail. As for an Ambassadorial/Senior Official segment floated by some Member States, the Delegation was not convinced about its usefulness at this stage of the negotiations. The issues before the IGC should be resolved through the technical work by the experts at the IGC. That was the best way to advance the work. With regard to the mandate and a diplomatic conference, the Delegation interpreted the mandate given by the General Assembly in 2012 as an open mandate which allowed the IGC to make a recommendation or decision on convening a diplomatic conference at a time when it was appropriate from the perspective of the maturity of the texts. Therefore, it believed that the texts, in spite of the developments in this session, required further work before such recommendations or decisions. The Delegation remained committed to be engaged in future constructive discussions on the work program and the decision of the General Assembly.

The Delegation of Indonesia, speaking on behalf of the Like-Minded Countries (LMCs), thanked the Friend of the Chair. It referred to the decision of the General Assembly in 2013 regarding the IGC mandate for the biennium of 2014/2015 with a view to finalizing the three texts on GRs, TK and TCEs, and which required the General Assembly in 2014 to take stock of and consider the texts, progress made and take a decision on convening a diplomatic conference. Substantive progress had been made during the IGC sessions in 2014 which brought new and constructive approaches to the discussions with a view to resolving some key outstanding issues, including the scope of rights approach. However, this IGC session had not met its expectations to have a decision on the recommendation to the General Assembly in 2014 and to finalize the three texts. For the way forward, it suggested that the General Assembly in 2014 decide on convening a diplomatic conference in 2015. The IGC needed a sound and robust work program consisting of some elements as follows: 1. To convene three IGC sessions in 2015 for text-based negotiations with one session extending to ten days with back-to-back discussions on TK and TCEs. The IGC needed to prioritize the decision on the following: scope of protection, exceptions and limitations, objectives and principles and the disclosure requirement. Once those were resolved, it would be easier to achieve clarity on the remaining pending issues. 2. To convene a high-level Ambassadorial/Senior Officials level meeting during the last session of the IGC in 2015 to find a solution to the critical issues which could not be resolved at the expert level and provide guidance for the process leading to the diplomatic conference. 3. To convene an intersessional meeting and cross-regional meeting before the General Assembly in 2015. In that regard, it suggested input from other groups and Member States as well as the Secretariat on how to organize such meetings. 4. To request the General Assembly and the PBC to allocate sufficient budget for the implementation of that work program in 2015.

The Delegation of Paraguay, speaking on behalf of the Group of Latin American and Caribbean States (GRULAC), said, in conformity with its opening statement, that it had

shown its commitment to the work of the IGC both in the expert session and in informal consultations. It had presented a proposed program of work for 2015 which had been distributed and supported by various delegations. That proposal had also been included in the work of the Friend of the Chair, whom it thanked for the documents he had provided. It stated that its proposal would be for four sessions, three thematic sessions and one high-level segment in 2015 at the end of the last session. It thanked the various delegations that had supported the idea of the high-level segment. Likewise, it had put forth specific topics for discussion, which reflected the debates held in the expert session and which had also been considered in the proposals of the Friend of the Chair. The major objective of the Delegation's proposal was to move forward with text-based negotiations towards a diplomatic conference to adopt international instruments which would ensure legal protection for TK, TCEs and GRs. That was the reason for putting forward its proposal to the Secretariat and it wished that it be part of future discussions. It also referred to the proposal by the Delegation of Switzerland and others on the Voluntary Fund, which it had considered and which it would follow up on in the framework of the PBC. It thanked the Secretariat as well as the facilitators for their support. [Note from the Secretariat: the following was the written statement as received from the Delegation of Paraguay on behalf of GRULAC]:

### **GRULAC PROPOSAL**

#### **IGC WORKING PROGRAM 2015**

<b>Indicative Dates</b>	<b>Activity</b>
<b>February 2015</b>  <b>(5 days)</b>	<b>IGC 29 GR</b>  Undertake text-based negotiations on GR with a focus on considering options for a draft legal text.  Duration 5 days.
<b>April 2015</b>  <b>(5 days)</b>	<b>IGC 30 TK</b> <ul style="list-style-type: none"> <li>• Consideration of Cross Cutting TK/TCE Issues – 1 day.</li> <li>• TK - Focus on text-based negotiations: 4 key Articles viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions - Duration 4 days.</li> </ul>
<b>May 2015</b>  <b>(5 days)</b>	<b>IGC 31 TCE</b> <ul style="list-style-type: none"> <li>• Consideration of Cross Cutting TK/TCE Issues – 1 day.</li> <li>• TCE - Focus on text-based negotiations: 4 key Articles viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions Duration 4 days.</li> </ul>
<b>July 2015</b>  <b>(3 days)</b>	<b>IGC 32 Cross-cutting session/Stocktaking</b> <ul style="list-style-type: none"> <li>• Cross Cutting GR/TK/TCE session</li> <li>• Ambassadors/Senior Capital-Based Officials meeting to share views on key policy issues relating to the negotiations</li> </ul>



	<p>on GRTKTCE, to further inform/guide the process. Duration – Half day.</p> <ul style="list-style-type: none"> <li>• Take stock of progress and make a recommendation to the General Assembly.</li> </ul> <p>Duration 3 days.</p>
<b>September 2015</b>	<p>WIPO General Assembly</p> <p>With a view to finalizing the text(s) within the biennium, the General Assembly in 2015 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.</p>

The Delegation of the Czech Republic, speaking on behalf of the Group of Central European and Baltic States (CEBS), thanked the Chair and Vice-Chairs and the Friend of the Chair for guiding the IGC through the informal process and the plenary proceedings in that session, especially on Agenda Item 6. It said it had engaged in good faith and had made suggestions, concrete or less concrete, during the informal process with a view to finding consensus on recommendations. Regretfully that had not been possible. The Delegation reserved the right to submit proposals, including in the lead-up to and during the proceedings of the General Assembly in 2014.

The Delegation of China thanked the Friend of the Chair for his leading role and efforts in guiding the consultations. It attached great importance to the process of discussion and in this session, the IGC had failed to reach any consensus on the recommendations and the future work program. The Delegation was very disappointed. It hoped all parties would show flexibility and make progress on some substantial topics. Regarding the work program and the diplomatic conference, it hoped after that session and before the next General Assembly that there would be discussions and that progress would be made. Lastly, the Delegation reserved its rights to make any comments or further recommendations at the next session.

The Delegation of the European Union (EU), speaking on behalf of the EU and its Member States, thanked the Friend of the Chair for all the work undertaken under this item. It said it remained committed to take part constructively in the discussions that would take place in the General Assembly and it regretted that, despite its constructive and flexible engagement at this session, the IGC had been unable to agree on a recommendation. It outlined its recommendations on the future program of work and on convening a diplomatic conference. With regards to the program of work, it supported 15 days of meetings in 2015. They would be allocated as follows: IGC 29 - eight days dedicated to TK and TCEs, taking place back-to-back, with no dedicated cross-cutting sessions. IGC 30 - four days on genetic resources. IGC 31 - three days with two days dedicated to cross-cutting issues and one day reserved for stock taking. The Delegation did not support the concept of a senior officials/high-level meeting. As regards methods of work, the work should continue to use an evidence-based approach drawing on national experiences. Furthermore, the IGC had to avoid an over-prescriptive definition of the agenda in order to reach consensus at the General Assembly. With regards to the mandate, it aligned its position with the statement made by the Delegation of Japan on behalf of Group B. This year's discussions had undoubtedly been fruitful and some good progress had been made. But there remained fundamental issues to be resolved in all texts before reaching a fully stabilized view. Finally, it reserved the right to review or refine its position ahead of the General Assembly.

The Delegation of Ghana thanked the Chair and the Secretariat for steering IGC 28. While it regretted the failure to arrive at a consensus on a recommendation to the General Assembly, it was pleased to note that substantial progress had been made and it believed that the current texts on TK, TCEs and GRs were mature enough for expedited consideration prior to the convening of a diplomatic conference in 2015. The Delegation aligned itself with the statement of the Delegation of Kenya, speaking on behalf of the African Group.

The Delegation of the United States of America thanked the Chair for his hard work and leadership, not only over the past three days of IGC 28, but also over the past three years. It also appreciated the professionalism and efforts of the facilitators. The Delegation remained committed to the process and hoped that all delegations would continue to actively share experiences and contribute and consider options to bring the IGC closer to a shared understanding of the policy objectives and core principles of its work. These included the erroneous grant of patents. The Delegation had circulated a draft work plan on the first day of IGC 28, which it wished reflected in the report [Note from the Secretariat: the following was the written proposal as received from the Delegation of the United States of America]:

### **Proposal of the United States of America**

#### **IGC Work Plan for 2015**

Bearing in mind that the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in 2000, with a mandate to discuss Intellectual Property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.

Recognizing the role of the intellectual property system in promoting innovation and the transfer and dissemination of technology to the mutual advantage of holders and users of genetic resources and traditional knowledge associated with genetic resources in a manner conducive to social and economic welfare;

Stressing the need to prevent patents from being granted erroneously for inventions or creations that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources, and acknowledging the existent, inherent capacity of the patent system to achieve that end;

Further stressing the need for patent offices to have available and consider the appropriate prior art on genetic resources and traditional knowledge associated with genetic resources needed to make proper and informed decisions on patent grant, and further stressing the importance of transparency in the process of granting patents;

Further noting that the mandate of the WIPO IGC was renewed for the 2014/2015 budgetary biennium, without prejudice to the work pursued in other fora, to continue to “expedite its work with open and full engagement, on text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs;”

Bearing in mind the Development Agenda recommendations, and acknowledging the progress made in the IGC since its work began in 2000, the WIPO General

Assembly requests that the IGC continue its work, with a view to finding common objectives and principles, developing an understanding of the scope of any protection to be accorded, and determining examples of what should be in the public domain, and finalizing the text(s) within the biennium:

The IGC is requested to submit to the 2015 General Assembly the text(s) related to the protection of GRs, TK and TCEs resulting from such further work, as well as a recommendation as whether or not the objectives, principles and text are sufficiently defined so as to schedule a Diplomatic conference and the need for further work. The 2015 General Assembly will, based upon such recommendation of the IGC, decide whether or not to convene any Diplomatic conference, and make any appropriate recommendations, taking account of the budgetary process. If IGC 31 fails to make a recommendation, the IGC will continue to meet in the next biennium, with the same frequency as other WIPO committees, with an agenda to be decided on a meeting by meeting basis.

In accordance with the mandate of the IGC for 2014/2015, the General Assembly decides that the IGC work plan for 2015 will be as set out below:

Provisional Date	Activity
Feb 2015	IGG 29 – continue text based negotiations on Genetic Resources with a focus on national experiences, addressing in particular the public domain, the definition of misappropriation, and how countries are handling transboundary issues. No indigenous panel, but the Secretariat will encourage such observers to participate during the session, including by giving planned presentations on the subjects to be addressed. (3 days). One day on practical aspects of databases. One day cross cutting session to discuss similarities and differences in the approach for GR and other topics.
May 2015	IGC 30 – continue text based negotiations on Traditional Knowledge with a focus on national experiences, addressing in particular beneficiaries of protection, local, national and regional experiences, including subject matter of protection and material in the public domain, the definition of misappropriation, and sharing local, national and regional experiences, and how countries are handling transboundary issues. No indigenous panel, but the Secretariat will encourage such observers to participate during the session, including by giving planned presentations on the subjects to be addressed. (3 days) One day on practical aspects of databases. One day cross cutting session to discuss similarities and differences in the approach for TK and other topics.

July 2015	IGC 31 – continue text based negotiations on Traditional cultural expressions with a focus on local, national and regional experiences, including subject matter of protection and material in the public domain, the definition of misappropriation, and sharing local, national and regional experiences, as well as beneficiaries and cross border issues. No indigenous panel, but the Secretariat will encourage such observers to participate during the session, including by giving planned presentations on the subjects to be addressed. (3 days) One day cross cutting to discuss similarities and differences in the approach for TCEs and other topics. One day to draft a recommendation for the 2015 WIPO General Assembly and any necessary work plan for the 2016/2017 biennium.
September / October 2015	WIPO General Assembly - Decide whether or not to convene any Diplomatic conference and make any appropriate recommendations, based upon the recommendation from IGC 31. If IGC 31 fails to make a recommendation, the IGC will continue to meet in the next biennium, with the same frequency as other WIPO committees, with an agenda to be decided on a meeting by meeting basis.

The Delegation of the Russian Federation thanked the Chair for his work over the week, as well as the Friend of the Chair, Mr. Ian Goss. It also thanked the Secretariat for the documents prepared and for its preparatory work. The IGC would not have been able to be as productive as it had been at that session without all of that work. IGC 28 had looked at a number of very important issues and had laid a robust basis for future discussions. Sadly, however, the IGC had not yet been able to reach consensus on a number of fundamental issues. The IGC needed to continue its discussions on these issues and on the documents relating to TK, TCEs and GRs the following year in order to reach consensus. The Delegation, therefore, believed that it would be appropriate to have three sessions of the IGC in 2015 for that purpose. It reserved its right to come back with further comments on this subject at the General Assembly.

The Representative of Tupaj Amaru regretted the fact that there was no political consensus on the issues at hand. This was due to a lack of political will to reach consensus on the part of Member States. The Representative agreed that the work of the IGC should continue in order to achieve a general political consensus, but he felt that the Chair should change the working methods and procedures of the IGC, especially given the fact that the IGC had a mandate to study the documents in plenary.

The Representative of CEM-Aymara, speaking on behalf of the Indigenous Caucus, indicated that the Indigenous Caucus had evaluated the progress of the IGC and recognized the progress made but was concerned with regard to future work. She recalled that Article 18 of the UNDRIP provided that the participation of Indigenous Peoples was of vital importance throughout this process. She welcomed the proposal by the Delegations of Australia, Finland, New Zealand and Switzerland for subsidiary contributions to the Voluntary Fund. This represented creative and innovative options for the Voluntary Fund. The Representative emphasized the importance of the participation and contribution of Indigenous Peoples in the IGC process and hoped for continued work on the protection of TK. She noted that Indigenous Peoples were concerned with the appropriation of their resources, and every day there were examples of such. She

emphasized that references to the public domain needed to be balanced with prior informed consent and asked for the guaranteed participation of Indigenous Peoples in the diplomatic conference that may be scheduled in 2015.

The Representative of Health and Environment Program (HEP) believed that work should continue in order to ensure the protection of TK, TCEs and GRs. Convening a diplomatic conference as rapidly as possible, and if possible in 2015, would allow the IGC to ultimately protect TK, TCEs and GRs.

The Delegation of Peru noted that GRULAC had made a lot of efforts, among other groups, to try and reach agreement and that some proposals had been put forward over the course of the session. It would be helpful if these were made available in the facilitator's document. While there was no agreement on a recommendation to the General Assembly at this stage, the work of the past couple of days would be a useful basis for a possible meeting in September 2014. Important points of view had been reflected, but of course, there were still divergences of opinion. There were still a lot of pending issues for the General Assembly to decide, but the Delegation was hopeful that the report that would be put forward would eventually lead to a favorable outcome for all.

## **CONTRIBUTION TO THE IMPLEMENTATION OF THE DEVELOPMENT AGENDA RECOMMENDATIONS**

8. 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 28 also discussed the contribution of the IGC to the implementation of the Development Agenda (DA) Recommendations.

9. In this regard, the following statements were made at IGC 28. These will also appear in the initial draft report of IGC 28 (WIPO/GRTKF/IC/28/11 Prov.), which will be made available, as requested by the IGC, by September 19, 2014:

The Delegation of Iran (Islamic Republic of) reiterated the importance of an efficient, functional and practical coordination mechanism to realize the contribution of WIPO Committees towards the full and effective implementation of the DA Recommendations and to carry out coordination between Committees. Unfortunately, despite the decision of the 2010 WIPO General Assembly and the establishment of such mechanism, proper functioning of the system currently had turned out to be a challenge in the implementation of the DA, which should be addressed by Member States at the General Assembly and CDIP meetings. It believed that the statements of Member States and their proposals under Agenda Item 7 should properly be addressed in the CDIP through a coordination mechanism so as to contribute to development in all WIPO activities. The fact that Recommendation 18 specifically referred to the IGC and called for the acceleration of its process was a clear demonstration of the importance of the IGC's negotiations and the ramifications of its outcome for development in the countries. The IGC process was an obvious example of the development-oriented IP norm-setting in WIPO. Success would send a message to developing countries that WIPO, as a UN specialized agency promoting IPRs, also took into account development concerns. By contrast, the failure of the process would not only undermine all ongoing norm-setting in the IP system, but also send a wrong message that WIPO Member States were not determined to strengthen the IP system in its entirety so as to enable developing countries to enjoy the necessary protection. A tiered approach to protection was being discussed. The scope of protection and different categories of rights arising from that could lead to economic and moral rights for the beneficiaries -- those who in most cases were living in developing countries. It was their long-pending aspirations to see that their TK, TCEs and GRs were protected against

misappropriation, misuse and biopiracy. Doing so would move the IP system in a more balanced direction, increasing the interests of developing countries in the IP system, improving the enabling environment for development, and enhancing the contribution of developing countries to global knowledge and global cultural partnerships. To realize all those objectives, the establishment of international binding instruments to protect TK, TCEs and GRs was essential. Building upon the Nagoya Protocol, the IGC should devise a mechanism which would ultimately bring comfort to the owners of TK, TCEs and GRs, to ensure their legitimate interests, and through that, to promote creativity and innovation. The Delegation invited the Secretariat to provide technical assistance to countries in order to enable them to formulate national protection systems for TK, TCEs and GRs, as well as to explore methods for the commercialization of TK and TCEs for the benefit of their owners.

The Delegation of Kenya, speaking on behalf of the African Group, noted that the 45 Recommendations adopted in 2007 had marked a big milestone in terms of balancing the IP system. Recommendation 18 called for “[accelerating] 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”. The African Group noted that the work undertaken at the IGC had progressed very well. What the IGC needed to do was, taking into account the needs of developing countries, to make a final decision to complete the work which had been ongoing for 15 years. The IGC could not continue to discuss endlessly without having an end date. In order to implement Recommendation 18, the IGC had to make a decision to convene a diplomatic conference. The African Group highlighted the importance of TK, TCEs and GRs. The work done by the IGC was substantive, substantial and mature. It was time to make a decision to bring the work to a close. With such a decision, the IGC would effectively contribute to the implementation of Recommendation 18. Otherwise, the IGC would fail in terms of the implementation of that particular recommendation.

The Delegation of India supported the statements made by the Delegation of Iran (Islamic Republic of) and the Delegation of Kenya on behalf of the African Group. The work of the IGC clearly reflected several DA Recommendations. The Delegation fully supported the view that the Member States needed to reach a common understanding in the IGC and other WIPO committees, as well as the WIPO General Assembly, to implement the DA Recommendations and the DA itself. Developing countries would like to see such an understanding.

The Delegation of Indonesia supported the statements made by the Delegations of Iran (Islamic Republic of), Kenya, on behalf of African Group, and India. It believed that Recommendation 18 of the DA should be implemented in an appropriate manner. In that regard, it would like to discuss further how the IGC could accelerate the process in concluding the international instrument or instruments, and how to accelerate and implement Recommendation 18 in a concrete manner. Regarding the texts of GRs, TK and TCEs, it was glad to see some provisions on technical assistance and awareness-raising. It would also like to add “development” in the objectives and principles of the texts, because the objectives of those texts were to develop the local society and indigenous peoples. The Delegation highlighted Articles 55 and 56 of the UN Charter. It was the obligation of WIPO, as a specialized agency of the UN, and each Member State of the UN, to reach agreements.

The Delegation of Nigeria supported the statement made by the Delegation of Kenya on behalf of the African Group. It congratulated the work of the IGC, and acknowledged the importance of the IGC coming to a swift and positive conclusion to its work, including its work and deliberations on the question of the Voluntary Fund. The Delegation remained committed to seeing a positive end to the process and, in particular, to seeing Member

States come forward with recommendations that were both facilitative and positive. It was particularly looking forward to the recommendations on the work program, the diplomatic conference and the Voluntary Fund, which were the remaining three issues.

The Delegation of Brazil supported the statements made by the Delegations of Iran (Islamic Republic of), India, Indonesia and Nigeria, and the intervention made by the Delegation of Kenya on behalf of the African Group. The DA had been an achievement of WIPO and of all its Member States. It was the key to guarantee that the 45 Recommendations of the DA would be mainstreamed in the work of the IGC, as well as all other bodies in WIPO. The Delegation highlighted Recommendation 18. The IGC had made good progress in terms of substance in the past years, but it needed to move forward with the process. In this regard, the work plan to be adopted for 2015 needed to reflect the importance and the high priority attached by Member States to the IGC. It was time to show strong commitment to expedite negotiations and finalize the work. The adoption of effective and binding instruments to protect and to prevent the misappropriation and misuse of GRs, TK and TCEs was what the IGC should be looking for. The full implementation of the DA was incompatible with a lack of interest of Member States in the IGC negotiations. Taking into account the 13 years that had been put into the IGC's work on the three subjects, it should be unacceptable that all the efforts done did not culminate in a positive outcome that fulfilled the recommendations of the DA and the aspirations of indigenous peoples and local communities.

The Representative of Tupaj Amaru supported the statement made by the Delegation of Iran (Islamic Republic of) and by the Delegation of Kenya on behalf of the African Group. He stated that the IGC had failed in its task over the last three years. For example, the IGC was trying to define sacred TK. No-one had actually been able to define it. He remembered that 15 years ago the Member States of the UN had wanted to define indigenous peoples and to recognize their rights. It was the same exercise. He believed that the success of the IGC would depend on the political will of Member States to recognize indigenous peoples and local communities. The issues discussed in the IGC were urgent because indigenous peoples were becoming extinct and their natural resources and GRs were being misused by some big multinational companies. Indigenous peoples needed an international instrument(s) to protect their GRs, TK and TCEs. Indigenous peoples did not want development that would destroy their GRs and TK. They wanted development that was equitable and fair, and would enable indigenous peoples to share their wealth. He believed that indigenous peoples needed a binding instrument which could be applied and implemented.

The Delegation of Morocco supported the statement made by the Delegation of Kenya on behalf of the African Group. It shared the interest shown by the other delegations as to the vision of the IGC and the implementation of the DA Recommendations to ensure equitable and sustainable development of the Member States, in particular developing countries. It emphasized its desire to see an outcome of the IGC's work, and to be able to make a recommendation to the 2014 WIPO General Assembly on holding a diplomatic conference to adopt an instrument or instruments, which would ensure the effective protection of GRs, TK and TCEs.

The Delegation of China supported the statements made by the Delegations of India, Indonesia, Kenya on behalf of the African Group, and Iran (Islamic Republic of). It believed the protection of GRs, TK, and TCE was of great significance for the implementation of the DA and the IGC's work was of utmost importance for the protection of GRs, TK and TCEs. Despite the difficulties, the IGC had made significant progress. It hoped that, when the time was right, agreements could be reached on a legally binding instrument(s) which would contribute to the realization of the legitimate concerns of developing countries and implementation of the DA.

The Delegation of Peru believed that the negotiations were approaching the final phase for the adoption of an international legally binding instrument(s) to determine the access to and the use of GRs, TK and TCEs, to avoid misappropriation of GRs, TK and TCEs, and to ensure fair and equitable benefit-sharing arising from the use of GRs, TK and TCEs. Those three elements were closely linked to development. The Delegation supported the work of IGC 28 with the objective of formulating a recommendation to the WIPO General Assembly to ensure to hold a diplomatic conference in 2015.

The Delegation of South Africa aligned itself with the statement made by the Delegation of Kenya on behalf of the African Group, and supported the statements made by the Delegations of Brazil, Iran (Islamic Republic of) and other LMCs. The work of the IGC was aligned to Recommendation 18. The IGC had been asked to accelerate the work since 2007, so the ultimate conclusion of the work must be to convene a diplomatic conference to adopt a legally binding instrument(s) on GRs, TK and TCEs. That would realize Recommendation 18. The Delegation believed that it was time to conclude the work of the IGC. The Delegation reminded other delegations that, when discussing the work program and the recommendation to the WIPO General Assembly, the main aim must be to conclude the work of the IGC.

The Delegation of Azerbaijan noted that, although the IGC had not achieved the expected outcome of establishing an international system for protecting GRs, TK and TCEs, WIPO was continuing to focus its steadfast attention on addressing the issue. Convening IGC 28, where the draft texts would be put forward and recommendations for the consideration of the WIPO General Assembly would be prepared, was the next step for WIPO Member States towards adopting an international instrument(s) for protecting TK, TCEs and GRs. It was more important than ever to combine the efforts of all Member States to agree upon the final texts containing the proposals and comments made by all stakeholders. The Delegation believed that IGC 28 would provide significant momentum to resolve many of the contentious issues relating to the final texts. That required, however, that delegations should continue to maintain an atmosphere of mutual understanding, since only through the constructive participation of all sides could the IGC achieve a mutually acceptable agreement. It should be recognized that the texts of the instruments were a significant achievement and were testament to the substantial and important work of Member States towards adopting an international instrument(s). An analysis of the drafts showed that, during their preparation, a flexible and balanced approach had been taken and the best elements had been selected for the final texts. It also noted the particular role of the WIPO Secretariat, which had carried out dedicated work to study, compile and analyze the delegations' proposals. It believed that all delegates would make every effort to achieve the goal of preparing the final texts at IGC 28. The statements made by the delegations at previous sessions and IGC 28 confirmed that WIPO Member States were optimistic and were able to reach consensus on contentious issues where their positions differed somewhat. The Delegation wished to emphasize that the issues under discussion were most timely for Azerbaijan. The Government of Azerbaijan was interested in adopting an international legal instrument(s) which would ensure the effective protection of GRs, TK and TCEs. The Delegation supported the efforts made by WIPO regarding the adoption of an international legal instrument(s) and was ready to make its contribution to fulfilling the recommendations of the DA. That would ensure that work on the drafts advanced in a meaningful manner in order that the 2014 WIPO General Assembly could take stock and decide on convening a diplomatic conference in 2015.



10. *The WIPO General Assembly is, in line with the IGC's mandate for the 2014/2015 biennium and the IGC's work program for 2014, invited to take stock of and consider the texts, progress made and decide on convening a diplomatic conference, and to consider the need for additional meetings, taking account of the budgetary process.*

[Annexes follow]

**Date: February 7, 2014**

**Consolidated Document Relating to Intellectual Property and Genetic  
Resources  
Rev. 2**

## LIST OF TERMS

### **[Associated Traditional Knowledge]**

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

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

“Traditional knowledge associated with genetic resources” means substantive knowledge of the properties and uses of genetic resources [and their derivatives] held by indigenous [people[s]] and local communities [and which directly leads to a claimed [invention] [intellectual property]].]

### **[Biotechnology]**

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

### **[Country of Origin]**

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

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

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

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

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

### **[Derivative]**

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

## **Ex-Situ Conservation**

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

## **Genetic Material**

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

## **Genetic Resources**

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

## **In-Situ Conditions**

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

## **[Internationally Recognized Certificate of Compliance**

“Internationally recognized certificate of compliance” shall mean the instrument foreseen in Article 17.2 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.]

## **[Member State**

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

## **[Misappropriation**

### Option 1

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

### Option 2

[“Misappropriation” is the use of genetic resources, [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources] of another where the genetic resources or traditional knowledge has been acquired by the user from the holder through improper means or a breach of confidence which results in a violation of national law in a provider country. Use of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] that has been acquired by lawful means, such as reading publications, purchase, independent discovery, reverse

engineering and inadvertent disclosure resulting from the holders of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] failure to take reasonable protective measures, is not misappropriation.]

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

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

### **[[Physical] Access**

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

### **[Source**

Option 1

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

[Option 2

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

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

### **[Utilization**

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

## [PREAMBLE

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

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

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

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

[Promote transparency and dissemination of information.]

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

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

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

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

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

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

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

## POLICY OBJECTIVE[S]

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

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

**[ARTICLE 1]**  
**SUBJECT MATTER OF INSTRUMENT**

1.1 [This international legal instrument shall/should apply to any [IP] [patent] right or [application] [claimed invention] [derived from] [the utilization of] [directly based on] genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources]. [This instrument applies to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].]

**[ARTICLE 2]**  
**[SCOPE OF INSTRUMENT**

2.1 [This instrument provides measures to] [support the prevention of misappropriation of genetic resources, [genetic parts and components], [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] through the [IP] [patent] system.] [, including] to [prevent the patenting of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] that were not invented by the patent applicant or patentee or do not have an inventive step over genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources]].]

**[ARTICLE 3]**  
**[DISCLOSURE REQUIREMENT**

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

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

3.2 The disclosure requirement [shall/should] [does] not place an obligation on the [IP] [patent] offices to verify the contents of the disclosure. [But [IP] [patent] offices are required to provide effective guidance to [IP] [patent] applicants on how to meet disclosure requirements, and to provide an opportunity for applicants to obtain from [IP] [patent] offices a positive decision that disclosure requirements have been met.]

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

3.4 [Each Party shall/should make the information disclosed publically available at the time of publication.]



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

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

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

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

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

#### **[ARTICLE 5] [RELATIONSHIP WITH [PCT] AND [PLT]]**

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

#### **[ARTICLE 6] SANCTIONS AND REMEDIES**

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

- (a) Pre-Grant.
  - (i) Preventing further processing of [IP] [patent] applications until the disclosure requirements are met.
  - (ii) A [IP] [patent] office considering the application withdrawn [in accordance with national law].
  - (iii) Preventing or refusing to grant an [IP right] [patent].
- (b) [Post-Grant].
  - (i) Publication of judicial rulings regarding failure to disclose.
  - (ii) [Fines or adequate compensation for damages, including payment of royalties.]
  - (iii) Other measures [including revocation] may be considered depending on the circumstances of the case, in accordance with national law.]]

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

**[ARTICLE 7]  
[NO NEW DISCLOSURE REQUIREMENT**

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

**[DEFENSIVE MEASURES<sup>5</sup>**

**[ARTICLE 8]  
[DUE DILIGENCE**

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

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

**[ARTICLE 9]  
[PREVENTION OF THE ERRONEOUS GRANT OF PATENTS AND VOLUNTARY CODES OF CONDUCT**

9.1 Member States shall/should:

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

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

- c. [Encourage, as appropriate, the development and use of voluntary codes of conduct and guidelines for users regarding the protection of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].]
- d. Facilitate, as appropriate, the creation, exchange, dissemination of, and access to, databases of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] for use by patent offices.]

## **DATABASE SEARCH SYSTEMS**

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

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

## **WIPO PORTAL SITE**

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

## **[ARTICLE 10] RELATIONSHIP WITH INTERNATIONAL AGREEMENTS**

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

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

**[ARTICLE 11]  
INTERNATIONAL COOPERATION**

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

**[ARTICLE 12]  
TRANSBOUNDARY COOPERATION**

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

**[ARTICLE 13]  
TECHNICAL ASSISTANCE, COOPERATION AND CAPACITY BUILDING**

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

[Annex B follows]

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

**Rev. 2 (March 28, 2014, 8:00 pm)**

## PREAMBLE/INTRODUCTION

### *Recognize value*

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

### *Promote awareness and respect*

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

### *Alternative*

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

[End of alternative]

### *Promote [conservation and] preservation of traditional knowledge*

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

### *Consistency with relevant international agreements and processes*

(iv) *take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that relate to intellectual property and access to and benefit sharing from genetic resources which are associated with that traditional knowledge;*

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

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

*Document and conserve traditional knowledge*

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

*Promote innovation*

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

*Provide new rules and disciplines*

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

*Relationship with customary use*

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

## POLICY OBJECTIVES

*This instrument should aim to:*

Provide Indigenous [Peoples] and [local communities] [and nations]/[beneficiaries] with the [legal and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to:

- a. [prevent] the [misappropriation/misuse/unauthorized use/unfair and inequitable uses] of their traditional knowledge;
- b. [control ways in which their traditional knowledge is used beyond the traditional and customary context;]
- c. [promote [the equitable sharing of benefits arising from their use with prior informed consent or approval and involvement or approval and involvement]/[fair and equitable compensation], as necessary; and]
- d. encourage [and protect] [tradition-based] creation and innovation.

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



## USE OF TERMS

For the purposes of this instrument:

**[Misappropriation]** means

*Option 1*

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

*Option 2*

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

**[Misuse]** may occur where the traditional knowledge which belongs to a beneficiary is used by the user in a manner that results in a violation of national law or measures endorsed by the legislature in the country where the use is carried out; the nature of the protection or safeguarding of traditional knowledge at the national level may take different forms such new forms of intellectual property protection, protection based on principles of unfair competition or a measures-based approach or a combination thereof.]

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

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

**[Traditional knowledge]** [refers to]/[includes]/[means], for the purposes of this instrument, know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states].

[Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.]

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

**[[“Use”]/[“utilization”] means**

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

## ARTICLE 1

### SUBJECT MATTER OF [PROTECTION]/[INSTRUMENT]

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

- (a) that is created, and [maintained] in a collective context, by indigenous [peoples] and local communities [or nations] [,whether it is widely spread or not];
- (b) that is [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];
- (c) that is transmitted from generation to generation, whether consecutively or not;
- (d) which may subsist in codified, oral or other forms; and [or]
- (e) which may be dynamic and evolving.

#### [Criteria for Eligibility]

Protected traditional knowledge is traditional knowledge that is [distinctively] associated with the cultural heritage of beneficiaries as defined in Article 2, that is generated, [maintained], shared and transmitted in a collective context, is intergenerational and has been used for a term as has been determined by each [Member State]/[Contracting Party] [but not less than 50 years].

## ARTICLE 2

### BENEFICIARIES OF PROTECTION

2.1 Beneficiaries [of protection] are indigenous [peoples] and local communities [and/or nations] who create, [hold], maintain, use and/[or] develop the [subject matter]/[traditional knowledge] [meeting the criteria for eligibility defined in Article 1]/[3].]

#### *Alternative*

2.1 [Beneficiaries of [protection] are indigenous [peoples] and local communities<sup>1</sup> who create, [hold], maintain, use and/[or] develop the [subject matter]/[traditional knowledge] defined in Article 1.]

*[End of alternative]*

2.2 [Where the [subject matter]/[traditional knowledge] [is not claimed by specific indigenous [peoples] or local communities despite reasonable efforts to identify them,] [Member States]/[Contracting Parties] may designate a national authority as custodian of the [benefits]/[beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional knowledge] [traditional knowledge meeting the eligibility criteria in Article 1] as defined in Article 1:

- (a) is held by a community [whose] in a territory [is] that is entirely and exclusively coterminous with the territory of that [Member State]/[Contracting Party];
- (b) [is not confined to a specific indigenous [people] or local community;
- (c) is not attributable to a specific indigenous [people] or local community; or
- (d) [is not claimed by a specific indigenous [people] or local community.]

2.3 [The [identity] of any national authority established under Paragraph 2 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

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<sup>1</sup> [Where a [Member State's]/[Contracting Party's] constitution [does not recognize] indigenous or local communities, then that [Member State]/[Contracting Party] may act as a beneficiary with regard to the traditional knowledge that exists within its territory.] [Note: This footnote is to be read as part of the alternative to Paragraph 1.]

## ARTICLE 3

### [[CRITERIA FOR AND] SCOPE OF PROTECTION

#### Scope of Protection

3.1 Where the [subject matter]/[traditional knowledge]/[protected traditional knowledge] is [sacred], [secret] or [otherwise known] [closely held] within indigenous [peoples] or local communities, [Member States]/[Contracting Parties] [should]/[shall]:

- (a) [ensure that beneficiaries have the exclusive and collective right to]/[provide legal, policy and administrative measures, as appropriate and in accordance with national law that allow beneficiaries to]:
  - i. [create,] maintain, control and develop said [subject matter]/[traditional knowledge]/[protected traditional knowledge];
  - ii. discourage the unauthorized disclosure, use or other uses of [secret] [protected] traditional knowledge;
  - iii. [authorize or deny the access to and use/utilization of said [subject matter]/[traditional knowledge]/[protected traditional knowledge] based on prior and informed consent; and]
  - iv. [be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications, which may [shall] require evidence of compliance with prior informed consent or approval and involvement and benefit sharing requirements, in accordance with national law and international legal obligations],
- (b) [ensure that]/[encourage] users [to]:
  - i. attribute said [subject matter]/[traditional knowledge]/[protected traditional knowledge] to the beneficiaries;
  - ii. [provide beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation], arising from the use/utilization of said [subject matter]/[traditional knowledge] based on mutually agreed terms;]

#### *Alternative*

- ii. enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional knowledge]/[protected traditional knowledge];

*[End of alternative]*

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

3.2 [Where the [subject matter]/[traditional knowledge]/[protected traditional knowledge] is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is publicly available [but neither widely known, [sacred], nor [secret]], [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] that users]/[provide legal, policy

and administrative measures, as appropriate and in accordance with national law to [ensure] [encourage] users [to]:

- (a) attribute and acknowledge the beneficiaries as the source of the [subject matter]/[traditional knowledge]/[protected traditional knowledge, unless the beneficiaries decide otherwise, or the [subject matter]/[traditional knowledge] is not attributable to a specific indigenous [people] or local community;
- (b) [provide the beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation] arising from the use/utilization of said [subject matter]/[traditional knowledge]/[protected traditional knowledge] based on mutually agreed terms;]

*Alternative*

- (b) enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional knowledge]/[protected traditional knowledge];

*[End of alternative]*

- (c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the [subject matter]/[traditional knowledge]/ [protected traditional knowledge]; and][.]]
- (d) [be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications, which may [shall] require evidence of compliance with prior informed consent or approval and involvement and benefit sharing requirements, in accordance with national law and international legal obligations].]

3.3 [Where the [subject matter]/[traditional knowledge]/[protected traditional knowledge] is [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 2 or 3], and protected under national law, [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] users of said [subject matter]/[traditional knowledge] [to]:

- (a) attribute said [subject matter]/[traditional knowledge]/[protected traditional knowledge] to the beneficiaries;
- (b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the [subject matter]/[traditional knowledge]/[protected traditional knowledge]; [and]
- (c) where applicable, deposit any user fee into the fund constituted by such [Member State]/ [Contracting Party].]

*Alternative*

3.3 [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, [for a reasonable period of time], in the public domain, protected by an intellectual property right or the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.]]

[ARTICLE 3 BIS

COMPLEMENTARY MEASURES

- 3BIS.1 [Member States]/[Contracting Parties] should [endeavour to], subject to and consistent with national and customary law:
- (a) facilitate/encourage the development national traditional knowledge databases for the defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation;
  - (b) [facilitate/encourage, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;]
  - (c) [provide opposition measures that will allow third parties to dispute the validity of a patent [by submitting prior art];]
  - (d) encourage the development and use of voluntary codes of conduct;
  - (e) [discourage information lawfully within the beneficiaries' control from being disclosed, acquired by or used by others without the beneficiaries' [consent], in a manner contrary to fair commercial practices, so long as it is [secret], that reasonable steps have been taken to prevent unauthorized disclosure, and has value;]
  - (f) [consider the establishment of databases of traditional knowledge that are accessible to patent offices to avoid the erroneous grant of patents compile and maintain such databases in accordance with national law;
    - i. there should be minimum standards to harmonize the structure and content of such databases;
    - ii. the content of the databases should be:
      - a. languages that can be understood by patent examiners;
      - b. written and oral information regarding traditional knowledge;
      - c. relevant written and oral prior art related to traditional knowledge.]
  - (g) [develop appropriate and adequate guidelines for the purpose of conducting search and examination of patent applications relating to traditional knowledge by patent offices;]
- 3BIS.2 [In order to document how and where traditional knowledge is practiced, and to preserve and maintain such knowledge, efforts [should]/[shall] be made by national authorities to codify the oral information related to traditional knowledge and to develop databases of traditional knowledge.]]
- 3BIS.3 [Member States]/[Contracting Parties] [should]/[shall] consider cooperating in the creation of such databases, especially where traditional knowledge is not uniquely held within the boundaries of a [Member States]/[Contracting Parties]. If protected traditional knowledge pursuant to article 1.2 is included in a database, the protected traditional knowledge should only be made available to others with the prior informed consent or approval and involvement of the traditional knowledge holder.

- 3BIS.4 Efforts[should]/[shall] also be made to facilitate access to such databases by intellectual property offices, so that the appropriate decision can be made. To facilitate such access, [Member States]/[Contracting Parties] [should]/[shall] consider efficiencies that can be gained from international cooperation. The information made available to intellectual property offices [should]/[shall] only include information that can be used to refuse a grant of cooperation, and thus [should]/[shall] not include protected traditional knowledge.
- 3BIS.5 Efforts [should]/[shall] be made by national authorities to codify the information related to traditional knowledge for the purpose of enhancing the development of databases of traditional knowledge, so as to preserve and maintain such knowledge.
- 3BIS.6 Efforts [should]/[shall] also be made to facilitate access to information including information made available in databases relating to traditional knowledge by intellectual property offices.
- 3BIS.7 Intellectual property offices [should]/[shall] ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application.]



## ARTICLE 4

### SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

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

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

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

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

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

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

[ARTICLE 4 BIS

DISCLOSURE REQUIREMENT

4 BIS.1 [[Patent and plant variety] Intellectual property applications that concern [an invention] any process or product that relates to or uses traditional knowledge shall include information on the country from which the [inventor or the breeder] applicant collected or received the knowledge (the providing country), and the country of origin if the providing country is not the same as the country of origin of the traditional knowledge. The application shall also state whether prior informed consent or approval and involvement to access and use has been obtained.]

4 BIS.2 [If the information set out in Paragraph 1 is not known to the applicant, the applicant shall state the immediate source from which the [inventor or the breeder] applicant collected or received the traditional knowledge.]

4 BIS.3 [If the applicant does not comply with the provisions in Paragraphs 1 and 2, the application shall not be processed until the requirements are met. The [patent or plant variety] intellectual property office may set a time limit for the applicant to comply with the provisions in paragraphs 1 and 2. If the applicant does not submit such information within the set time limit, the [patent or plant variety] intellectual property office may reject the application.]

4 BIS.4 [Rights arising from a granted patent or a granted plant variety right shall not be affected by [any later discovery of] a failure by the applicant to comply with the provisions in Paragraphs 1 and 2. Other sanctions, outside of the patent system and the plant variety system, provided for in national law, including criminal sanctions such as fines, may however be imposed.]

*Alternative*

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

*[End of alternative]*

*Alternative*

[NO DISCLOSURE REQUIREMENT

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

*[End of alternative]*

ARTICLE 5

ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]

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

*Optional addition*

[Where so requested by the beneficiaries, a competent authority may, to the extent authorized by the beneficiaries and for their direct benefit, assist with the management of the beneficiaries' rights/interests under this [instrument].]

*[End of optional addition]*

*Alternative*

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

*[End of alternative]*

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

[ARTICLE 6  
EXCEPTIONS AND LIMITATIONS

General Exceptions

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

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

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

Specific Exceptions

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

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

This provision, with the exception of Subparagraph (c), [should]/[shall] not apply to traditional knowledge described in Article 3.1.]

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

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

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

6.4 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 3 shall not apply to any use of knowledge that:]

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

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

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

6.6 [[Member States]/[Contracting Parties] may exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.]]

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

## ARTICLE 7

### TERM OF PROTECTION/RIGHTS

[Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional knowledge in accordance with [Article 3/[which may] [should]/[shall] last as long as the traditional knowledge fulfills/satisfies the [criteria of eligibility for protection] according to Article [1]/[3].]

ARTICLE 8  
FORMALITIES

*Option 1*

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

*Option 2*

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

*Alternative*

[The protection of traditional knowledge under Article 3.1 [should]/[shall] not be subject to any formality. However, in the interest of transparency, certainty and the conservation of traditional knowledge, the relevant national authority (or authorities) or intergovernmental regional authority (or authorities) may maintain registers or other records of traditional knowledge to facilitate protection under Articles 3.2 and 3.3.]

*[End of alternative]*

ARTICLE 9  
TRANSITIONAL MEASURES

9.1 These provisions [should]/[shall] apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article [1]/[3].

*Optional addition*

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

*Alternative*

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

*Alternative*

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

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



[ARTICLE 10

RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS

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

[ARTICLE 11  
NATIONAL TREATMENT

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

*Alternative*

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

*[End of alternative]*

*Alternative*

[Each [Member State]/[Contracting Party] [should]/[shall] in respect of traditional knowledge that fulfills the criteria set out in Article 1, accord within its territory to beneficiaries of protection as defined in Article 2, whose members primarily are nationals of or are domiciled in the territory of, any of the other [Member States]/[Contracting Parties], the same treatment that it accords to its national beneficiaries.]

*[End of alternative]*

## ARTICLE 12

### TRANSBOUNDARY COOPERATION

12.1 In instances where the same [protected] traditional knowledge [under Article 3] is found within the territory of more than one [Member State]/[Contracting Party], those [Member States]/[Contracting Parties] [should]/[shall] endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this [instrument].

12.2 Where the same [protected] traditional knowledge [under Article 3] is shared by one or more indigenous and local communities in several [Member States]/[Contracting Parties], those [Member States]/ [Contracting Parties] [should]/[shall] endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objectives of this [instrument].

[Annex C follows]

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

**Rev. 2 (April 4, 2014, 3.00 pm)**

[PRINCIPLES/PREAMBLE/INTRODUCTION]

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

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

## OBJECTIVES

1. To provide Indigenous [Peoples] and [local communities] [and nations] / [beneficiaries] with the [legislative, policy [and]/[or] administrative]/[and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to:
  - (a) [prevent] the [misappropriation and misuse/offensive and derogatory use] of their traditional cultural expressions [and adaptations thereof];
  - (b) [control ways in which their traditional cultural expressions [and adaptations thereof] are used beyond the traditional and customary context [and promote the equitable sharing of benefits arising from their use], as necessary;]
  - (c) [promote [the equitable compensation]/[sharing of benefits] arising from their use with prior informed consent or approval and involvement]/[fair and equitable compensation], as necessary; and]
  - (d) encourage [and protect] [tradition-based] creation and [innovation].
2. [To [prevent/preclude] the [grant], exercise and [enforcement] of intellectual property rights [acquired by unauthorized parties/inappropriately acquired] over traditional cultural expressions [and their adaptations]].
3. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the prior informed consent or approval and involvement of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]
- [4. To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

## USE OF TERMS

For the purposes of this instrument:

**[Traditional] cultural expression** means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions<sup>1</sup>, materials<sup>2</sup>, music and sound<sup>3</sup>, verbal<sup>4</sup> and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].

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

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

**[["Use"/["Utilization"]]** means

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

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<sup>1</sup> [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

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

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

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



[ARTICLE 1]

[ELIGIBLE]/[ELIGIBILITY CRITERIA FOR] SUBJECT MATTER OF  
[PROTECTION]/[SAFEGUARDING]

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

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

[ARTICLE 2]

BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]

2.1 Beneficiaries [of protection] are indigenous [peoples] and local communities [and/or nations] [and nations that are custodians for the beneficiaries as provided for in Paragraph 3] [who [create], express, maintain, use and/[or] develop the [subject matter]/[traditional cultural expressions] [as part of their collective cultural or social identity]] [meeting the criteria for eligibility defined in this [instrument], or as determined by national law.]

*Alternative*

2.1 [Beneficiaries [of protection] are indigenous [peoples] and local communities, or as determined by national law.]

*[End of Alternative]*

2.2 [Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may act, for the interests of an indigenous or local community, as a beneficiary with regard to traditional cultural expressions that [exclusively] exist within that [Member State's]/[Contracting Party's] territory, provided that the constitution or national law of that [Member State]/[Contracting Party] so requires.]

2.3 [Where the [subject matter]/[traditional cultural expressions] [is not claimed by specific indigenous [peoples] or local communities despite reasonable efforts by the Member State to identify them,] [Member States]/[Contracting Parties] may designate a national authority as custodian of/for the [benefits]/ [beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional cultural expressions] [traditional cultural expressions meeting the eligibility criteria in this [instrument]] as defined in this [instrument]:

- (a) is expressed within a community [whose] in a territory [is] that is entirely and exclusively coterminous with the territory of that [Member State]/[Contracting Party];
- (b) [is not confined to a specific indigenous [people] or local community; or
- (c) is not attributable to a specific indigenous [people] or local community.]

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

[ARTICLE 3]

[CRITERIA FOR ELIGIBILITY]/SCOPE OF [PROTECTION]/[SAFEGUARDING]

*Option 1*

[Scope of Protection]

3.1 Where the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, [Member States]/[Contracting Parties] [should]/[shall] :

- (a) [ensure that beneficiaries have the exclusive and collective right to]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to]:
  - i. [create,] maintain, control and develop said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions];
  - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unauthorized use<sup>1</sup> of [secret] [protected] traditional cultural expressions;
  - iii. [authorize or deny the access to and use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior and informed consent or approval and involvement and mutually agreed terms;]
  - iv. protect against any [false or misleading] uses of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
  - v. [prevent] prohibit use or modification which distorts or mutilates a [protected] traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary.
- (b) [ensure that]/[encourage] users [to]:
  - i. attribute said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] to the beneficiaries;
  - ii. [provide beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation], arising from the use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior informed consent or approval and involvement and mutually agreed terms; and]

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<sup>1</sup> [Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.]

*Alternative*

ii. enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] with prior informed consent or approval and involvement]; and

*[End of alternative]*

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

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

- (a) attribute and acknowledge the beneficiaries as the source of the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions], [unless the beneficiaries decide otherwise], or the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] is not attributable to a specific indigenous [people] or local community[; and][.]
- (b) [provide the beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation] arising from the use/[utilization] of said [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] based on prior informed consent or approval and involvement and mutually agreed terms;]

*Alternative*

(b) [enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional cultural expressions]/[protected traditional cultural expressions] with prior informed consent or approval and involvement];

*[End of alternative]*

- (c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [subject matter]/[traditional cultural expressions]/ [protected traditional cultural expressions][; and][.]
- (d) [refrain from any [false or misleading uses] of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

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

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

*Option 2*

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

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

[ARTICLE 4]

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

4.1 [Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a competent authority or authorities, [with the prior informed consent or approval and involvement of] [in consultation with] [traditional cultural expressions [holders]/[owners]], in accordance with their national law [and without prejudice to the right of traditional cultural expression [holders]/[owners] to administer their [rights]/[interests] according to their customary protocols, understandings, laws and practices].

*Alternative 1*

4.1 [Where so requested by the beneficiaries, a competent authority may, to the extent authorized by the beneficiaries and for their direct benefit, assist with the management of the beneficiaries' rights]/[interests] under this [instrument].]

*[End of Alternative 1]*

*Alternative 2*

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

*[End of Alternative 2]*

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

[ARTICLE 5]

EXCEPTIONS AND LIMITATIONS

General Exceptions

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

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

*Alternative*

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

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

*[End of Alternative]*

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

## Specific Exceptions

5.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law [and with the prior informed consent or approval and involvement of the beneficiaries] or, as appropriate, of the [holders]/[owners] of the original work:

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

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 3.1.]

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

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

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



[ARTICLE 6]

[TERM OF [PROTECTION]/[SAFEGUARDING]

*Option 1*

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

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

*Option 2*

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

*Option 3*

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

[ARTICLE 7]  
FORMALITIES

*Option 1*

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

*Option 2*

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

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

[ARTICLE 8]

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

8.1 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] provide appropriate legal, policy, administrative and/or other measures, in accordance with national law, to ensure the application of this instrument.]

8.1 *Option 2* [Member States]/[Contracting Parties] [should]/[shall], in accordance with their national law, provide the necessary legal, policy or administrative measures to prevent willful or negligent harm to the economic and moral rights of the beneficiaries, as well as provide accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies, including criminal and civil remedies, to ensure the application of this instrument.

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

8.3 [The means of redress for safeguarding the protection granted by this instrument [should]/[shall] be governed by the national law of the country where the protection is claimed.]

8.4 [[Member States]/[Contracting Parties] [should]/[shall], where a third party has misleadingly or unfairly acquired intellectual property rights over traditional cultural expressions without the prior informed consent of the beneficiaries, provide for the revocation of such intellectual property rights.]

8.5 [[Member States]/[Contracting Parties] [should]/[shall] [not apply sanctions [or provide for remedies]] in cases of incidental use/utilization/inclusion of a [protected] traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.]]

[ARTICLE 9]

[TRANSITIONAL MEASURES]

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

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

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

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

[ARTICLE 10]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

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

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

[ARTICLE 11]

[NATIONAL TREATMENT

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

[ARTICLE 12]

[TRANSBOUNDARY COOPERATION]

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

## ARTICLE 13

### [CAPACITY BUILDING AND AWARENESS RAISING

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

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

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

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

[End of Annex C and of document]