

## **WIPO General Assembly**

**Forty-Seventh (22<sup>nd</sup> Ordinary) Session**  
**Geneva, October 5 to 14, 2015**

**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="695 1420 852 1451">IGC 26 GR.</p> <ul data-bbox="695 1482 1315 1621" style="list-style-type: none"> <li data-bbox="695 1482 1315 1621">• 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="730 1653 957 1684">Duration half day</p> <ul data-bbox="695 1715 1385 1818" style="list-style-type: none"> <li data-bbox="695 1715 1385 1818">• Undertake text-based negotiations on GR with a focus on considering options for a draft legal text -</li> </ul> <p data-bbox="730 1787 1117 1818">Duration four and a half days.</p> <p data-bbox="730 1850 941 1881">Duration 5 days</p>

<p>April 2014</p>	<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 viz 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 viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions, duration 4 days</li> </ul> <p>Duration 10 days</p>
<p>July 2014</p>	<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>
<p>September 2014</p>	<p>WIPO General Assembly</p> <p>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.”</p>

### IGC SESSIONS AND GENERAL ASSEMBLY 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. Document WO/GA/46/6 contained a report to the 2014 General Assembly on the IGC’s activities in 2014 and enclosed the three draft texts of the IGC as at that time, 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). The same texts, unchanged, are enclosed with this present document for information purposes.

6. The 2014 General Assembly did not take a decision on this agenda item (see paragraph 173 of document WO/GA/46/12). The IGC has, therefore, not met since 2014.

*7. The WIPO General Assembly is invited to take note of this document, and to consider the extension of the mandate of the IGC for the 2016/2017 biennium and the terms thereof.*

[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]; and
  - (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>1</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]:

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<sup>1</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.

- (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].
- (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]*

(i) 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;
- (c) in the case of a national emergency or other circumstances of extreme urgency [or in cases of public non-commercial use]; and
- (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; and
- (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 favorable 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]