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

prepared by the Secretariat

I. INTRODUCTION

1. The WIPO General Assembly, at its Forty-Ninth (23rd Ordinary) Session in October 2017, agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2018/2019 biennium.
2. The IGC's mandate for the 2018/2019 biennium, which was set out in document WO/GA/49/21, provides as follows:

“Bearing in mind the Development Agenda recommendations, affirming the importance of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Committee), noting the different nature of these issues and acknowledging the progress made, the WIPO General Assembly agrees that the mandate of the Committee be renewed, without prejudice to the work pursued in other fora, as follows:

“(a) The Committee will, during the next budgetary biennium 2018/2019, continue to expedite its work, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective

protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).

“(b) The Committee’s work in the 2018/2019 biennium will build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues, including definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs subject matter is entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.

“(c) The Committee will follow, as set out in the table below, a work program based on sound working methods for the 2018/2019 biennium, including an evidence-based approach as set out in paragraph (d). This work program will make provision for 6 sessions of the Committee in 2018/2019, including thematic, cross-cutting and stocktaking sessions. The Committee may establish ad hoc expert group(s) to address a specific legal, policy or technical issue¹. The results of the work of such group(s) will be submitted to the Committee for consideration.

“(d) The Committee will use all WIPO working documents, including WIPO/GRTKF/IC/34/4, WIPO/GRTKF/IC/34/5 and WIPO/GRTKF/IC/34/8, as well as any other contributions of member states, such as conducting/updating studies covering, inter alia, examples of national experiences, including domestic legislation, impact assessments, databases, and examples of protectable subject matter and subject matter that is not intended to be protected; and outputs of any expert group(s) established by the Committee and related activities conducted under Program 4. The Secretariat is requested to update the 2008 gap analyses on the existing protection regimes related to TK and TCEs. The Secretariat is also requested to produce a report(s) compiling and updating studies, proposals and other materials relating to tools and activities on databases and on existing disclosure regimes relating to GR and associated TK, with a view to identify any gaps. However, studies or additional activities are not to delay progress or establish any preconditions for the negotiations.

“(e) In 2018, the Committee is requested to provide to the General Assembly a factual report along with the most recent texts available of its work up to that time with recommendations, and in 2019, submit to the General Assembly the results of its work in accordance with the objective reflected in paragraph (a). The General Assembly in 2019 will take stock of progress made, and based on the maturity of the texts, including levels of agreement on objectives, scope and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue negotiations.

“(f) 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 for the IGC.

¹ The expert group(s) will have a balanced regional representation and use an efficient working methodology. The expert group(s) will work during the weeks of the sessions of the IGC.

Work Program – 6 Sessions

Indicative Dates	Activity
February/March 2018	(IGC 35) Undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument Duration 5 days.
May/June 2018	(IGC 36) Undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument Expert group(s) Duration 5/6 days.
September 2018	(IGC 37) Undertake negotiations on TK/TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Possible recommendations as mentioned in paragraph (e) Duration 5 days.
October 2018	WIPO General Assembly Factual report and consider recommendations.
November/December 2018	(IGC 38) Undertake negotiations on TK/TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Expert group(s) Duration 5/6 days.
March/April 2019	(IGC 39) Undertake negotiations on TK/TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Duration 5 days.
June/July 2019	(IGC 40) Undertake negotiations on TK/TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Expert group(s) Stocktaking on GRs/TK/TCEs and making a recommendation Duration 5/6 days.
October 2019	WIPO General Assembly will take stock of the progress made, consider the text(s) and make the necessary decision(s)."

3. Paragraph (e) of the mandate for this biennium (quoted above) requests the IGC, in 2018, to “provide to the General Assembly a factual report along with the most recent texts available of its work up to that time with recommendations”. This document is prepared pursuant to this decision.

II. IGC SESSIONS IN 2018

4. Pursuant to the mandate for the 2018/2019 biennium and the work program for 2018, the IGC has, thus far, held three sessions in 2018² as follows:

- (a) IGC 35, from March 19 to 23, 2018, on the subject of GRs;
- (b) IGC 36, from June 25 to 29, 2018, on the subject of GRs;
- (c) IGC 37, from August 27 to 31, on the subjects of TK and TCEs.

5. IGC 35 developed the “Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2”, and decided that this text, as at the close of the session on March 23, 2018, be transmitted to IGC 36. The text was included in document WIPO/GRTKF/IC/36/4 and made available for IGC 36.

6. IGC 36 continued to work on the text but, unable to reach consensus on its revision, decided to transmit the text in the annex to document WIPO/GRTKF/IC/36/4 to IGC 40, in accordance with the Committee’s mandate for 2018/2019 and the work program for 2018, as contained in document WO/GA/49/21. The revised text prepared by the Facilitators and the Friend of the Chair will nonetheless be reflected in the report of IGC 36.

7. Pursuant to the decisions taken at IGC 36 as described immediately above, Annex I of the present document encloses the text in document WIPO/GRTKF/IC/36/4 for information purposes only.

8. IGC 37 addressed certain cross-cutting issues on TK and TCEs, and developed “The Protection of Traditional Knowledge: Draft Articles Rev. 2” and “The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2”. It decided that these texts, as at the close of the session on August 31, 2018, be transmitted to IGC 38, which will take place from December 10 to 14, 2018. These texts are enclosed in this document (Annexes II and III, respectively) for information purposes only.

III. AD HOC EXPERT GROUP ON GENETIC RESOURCES

9. Paragraph (c) of the mandate provides that the IGC “may establish *ad hoc* expert group(s) to address a specific legal, policy or technical issue”.

10. Pursuant to this decision and the decisions of IGC 35, an *ad hoc* expert group on genetic resources met on June 24, 2018, prior to IGC 36. The documents prepared for the *ad hoc* expert group on genetic resources are available [online](http://www.wipo.int/meetings/en/details.jsp?meeting_id=48546)².

11. IGC 37 decided to establish an *ad hoc* expert group on traditional knowledge and traditional cultural expressions, which will meet on December 9, 2018, prior to IGC 38.

IV. RECOMMENDATIONS TO THE GENERAL ASSEMBLY IN 2018

12. As noted above, paragraph (e) of the mandate provides that, in 2018, the IGC is requested to provide to the General Assembly a factual report along with the most recent texts available of its work up to that time with recommendations.

² http://www.wipo.int/meetings/en/details.jsp?meeting_id=48546

13. Pursuant to this element of the mandate, the IGC at its 37th session referred to above agreed on the following recommendations to the 2018 General Assembly:

“The 2018 WIPO General Assembly is invited to **consider** the ‘Report of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)’ (document WO/GA/50/8), and to **call upon** the IGC, based on progress made, to **expedite** its work in accordance with the mandate of the IGC for the biennium 2018/2019:

(a) **Noting** that at the conclusion of the 37th session all members of the IGC reaffirmed their commitment, based on the progress made, to expedite the Committee’s work, with the objective of reaching an agreement on an international instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs); and to work in a constructive and open way using sound working methods.

(b) **Acknowledging** the progress made at the 35th and 36th sessions on GRs, reflected in the report and draft report of the sessions respectively (WIPO/GRTKF/IC/35/10 and WIPO/GRTKF/IC/36/11 Prov.).

(c) **Noting** that GRs will next be considered at the “stocktaking” during the 40th session, where the Committee will consider next steps in relation to GRs, as well as TK and TCEs, including whether to recommend convening a diplomatic conference and/or continue negotiations.

(d) **Noting** progress made at the 37th session on TK and TCEs as reflected in the draft report of the session (WIPO/GRTKF/IC/37/17 Prov.).

(e) **Noting** that during the 38th, 39th and 40th sessions, the Committee will continue its work relating to TK and TCEs.

(f) **Recognizing** the importance of the participation of Indigenous peoples and local communities in the work of the IGC, **noting** that the WIPO Voluntary Fund is depleted, and **encouraging** Member States to consider contributing to the Fund and consider other alternative funding arrangements.”

V. CONTRIBUTION TO THE IMPLEMENTATION OF THE DEVELOPMENT AGENDA RECOMMENDATIONS

14. Further to the 2010 WIPO General Assembly decision “to instruct the relevant WIPO Bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendations”, IGC 37 also discussed the contribution of the IGC to the implementation of the Development Agenda (DA) Recommendations.

15. In this regard, the following statements were made at IGC 37. These will also appear in the initial draft report of IGC 37 (WIPO/GRTKF/IC/34/17 Prov.), which will be made available, as requested by the IGC, by November 5, 2018:

“The Delegation of Morocco, speaking on behalf of the African Group, welcomed the efforts undertaken by WIPO to integrate the Development Agenda (DA) into its work. It recalled Recommendation 18 and other relevant recommendations which were Recommendations 15, 16, 17, 19 and 22. The achievements of the IGC on those three topics were a tangible contribution of the IGC to the implementation of the DA, with the

adoption of an international legally binding treaty/treaties, which would strengthen transparency and effectiveness of the international IP system, protect the three subject matters, promote creation and guarantee the holders of TK and GRs the right to equitable benefit-sharing. The assistance provided by the WIPO Secretariat should meet the specific needs of the particular countries concerned in terms of development. The African Group was determined to achieve the objectives within the IGC and would continue to participate in its work constructively. It hoped that the remaining sessions would allow continuation of the implementation of Recommendation 18 as well as other relevant recommendations.

“The Delegation of the Islamic Republic of Iran said that the importance of the DA recommendations could not be overemphasized. As one of the developing countries, it was in favor of streamlining Recommendation 18. One of the important WIPO committees was the IGC and one of the recommendations dedicated to the work of the IGC was to accelerate the negotiations on different subject matters. The work of the IGC was an important contribution to the actualization and implementation of the GA recommendations. It urged all Member States to reconsider their approach in order to implement one of the important recommendations. It highlighted the importance of technical assistance provided by the Traditional Knowledge Division to some Member States with regard to their national legislation and in conducting and organizing joint projects with relevant national organizations, which could also be considered as one of the elements of implementation of the dedicated recommendation.

“The Delegation of Brazil stated that the outcome of the efforts of the IGC was key to a successful implementation of the DA as a whole. It recalled Recommendation 18 on the IGC and Recommendation 20 on the public domain. The participation of indigenous peoples in the IGC could be seen in light of Recommendation 21. By mainstreaming IP in those countries that had large traditional communities and indigenous groups and were rich in TK and TCEs, the IGC contributed in the most efficient way to the objectives of the DA. That went for all countries, regardless of their development levels. Countries like Australia, Canada, the USA and many others were richer countries that had a very wide treasury of TK, which should be preserved and protected as well.

“The Delegation of Nigeria recalled DA Recommendations 18, 20 and 21. The IGC’s tasks, with reference to GRs, TK and TCEs, were critical in addressing the global development deficit, and finding traction with the IP system. The development deficit globally affected mainly the world’s most vulnerable groups, whose greatest asset to addressing that deficit was their TK and TCEs. The work of the IGC was very critical to WIPO’s DA. The IGC’s work created a link between industry, indigenous peoples and local communities (IPLCs) and development, and therefore, the idea of creating a dichotomy or a conflict of interest between industrialized and developing countries in the IGC’s debates was not a sustainable conversation. In order to address global development deficits, industry and IPLCs all over the world had to come together, and the IGC provided that platform. In order to address global development deficits under the WIPO DA, understanding and collaboration across regional groups were very important. The work of the IGC, more than any other, contributed to bringing all the interests together in addressing the global development deficit. Participation of IPLCs was critical. The Delegation linked the legitimacy of the IGC to the participation of IPLCs.

“The Delegation of South Africa aligned itself with the statement made by the Delegation of Morocco, on behalf of the African Group. The adoption of the DA in 2007 had altered the mandate of WIPO to include the mainstreaming of the development dimension into its work. The IGC’s work played an important part towards the achievement of that mandate and should, therefore, be taken seriously.

“The Delegation of Indonesia recalled Recommendation 18 of the WIPO DA. It supported that the IGC would report the contribution to the implementation of that particular recommendation to the 2018 General Assembly, taking into account the factual situation throughout the mandate, whether the IGC had actually been implementing Recommendation 18.”

16. *The WIPO General Assembly is invited to **consider** the “Report of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)” (document WO/GA/50/8), and to **call upon** the IGC, based on progress made, to **expedite** its work in accordance with the mandate of the IGC for the biennium 2018/2019:*

*(a) **Noting** that at the conclusion of the 37th session all members of the IGC reaffirmed their commitment, based on the progress made, to expedite the Committee’s work, with the objective of reaching an agreement on an international instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs); and to work in a constructive and open way using sound working methods.*

*(b) **Acknowledging** the progress made at the 35th and 36th sessions on GRs, reflected in the report and draft report of the sessions respectively (WIPO/GRTKF/IC/35/10 and WIPO/GRTKF/IC/36/11 Prov.).*

*(c) **Noting** that GRs will next be considered at the “stocktaking” during the 40th session, where the Committee will consider next steps in relation to GRs, as well as TK and TCEs, including whether to recommend convening a*

*diplomatic conference and/or
continue negotiations.*

*(d) **Noting** progress made at
the 37th session on TK and
TCEs as reflected in the draft
report of the session
(WIPO/GRTKF/IC/37/17 Prov.).*

*(e) **Noting** that during the 38th,
39th and 40th sessions, the
Committee will continue its
work relating to TK and TCEs.*

*(f) **Recognizing** the
importance of the participation
of Indigenous peoples and local
communities in the work of the
IGC, **noting** that the WIPO
Voluntary Fund is depleted, and
encouraging Member States to
consider contributing to the
Fund and consider other
alternative funding
arrangements.*

[Annexes follow]

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

(Dated March 23, 2018)³

³ Note by the Secretariat: this text developed by IGC 35, was transmitted by IGC 36 to IGC 40.

[PREAMBLE

[Ensure [encourage] respect for [sovereign rights] [the rights] of [rightful holders, including] indigenous [people[s]] and local communities [as well as [people[s]] partially or entirely under occupation] over their genetic resources, and [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].]

[Contribute to the prevention of misappropriation of genetic resources and [traditional knowledge associated with genetic resources.]]

ALT

[Contribute to the prevention of unauthorized use of genetic resources and [traditional knowledge associated with genetic resources.]]

[Minimize the erroneous granting of [IP] [patent] rights.]

[Reaffirming the important economic, scientific, cultural, and commercial value of genetic resources and [traditional knowledge associated with genetic resources].]

[Acknowledging the important contribution of the patent system to scientific research, scientific development, innovation and economic development.]

[Stressing the need for members to ensure the correct grant of patents for novel and non-obvious inventions related to genetic resources and [traditional knowledge associated with genetic resources].]

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 and/or [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 and/or [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 and [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 and [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 and [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 and [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 *on* 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.]]

ALT

[Reaffirm, [in accordance] [consistent] with the Convention *on* Biological Diversity, the sovereign rights of States over [their] [natural] [biological] [genetic] resources [within their jurisdiction other than those associated with human beings], and that the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.]]

[Recognizing that the [IP][patent] system, which protects inventions and fosters innovation, intersects with the CBD and has a role to play in protecting genetic resources and traditional knowledge associated with genetic resources.]

Ensure that patent offices have appropriate information available to them on genetic resources and traditional knowledge associated with genetic resources, which they need in order to make informed decisions, in terms of granting patents

Reaffirm the stability and predictability of correctly granted patent rights.

Recognize that the erroneous granting of patents can be effectively addressed by improving databases for storing information related to genetic resources and non-secret traditional knowledge associated with genetic resources, which can thus be used to search prior rights and reference materials not only in the procedures of examination, but also in the proceedings of a procedure of invalidation against granted patents.

[ALTERNATIVE PREAMBLE

Acknowledging the UN Declaration on the Rights of Indigenous Peoples.

Recognizing the principles of free and prior informed consent and mutually agreed terms in relation to accessing and utilization of genetic resources and traditional knowledge associated with genetic resources.

Recognizing the role of the IP system in contributing to the protection of genetic resources, and traditional knowledge associated with genetic resources, including preventing misappropriation.

Ensuring mutual supportiveness with international agreements relating to the protection of genetic resources and traditional knowledge associated with genetic resources, and those relating to IP.

Promoting transparency in the IP/Patent system in relation to genetic resources and traditional knowledge associated with genetic resources.

Emphasizing the the importance of IP/Patent Offices having access to the the appropriate information on genetic resources and traditional knowledge associated with genetic resources to prevent the erroneous granting of IP/patent rights.

Recognizing the role of databases for storing information related to genetic resources and non secret traditional knowledge associated with genetic resources, in preventing the erroneous granting of patents, pre and post grant.

Reaffirming the important economic, scientific, cultural, and commercial value of genetic resources and traditional knowledge associated with genetic resources.

Reaffirming the stability and predictability of granted patents.

Recognizing and reaffirming the role the IP system plays in promoting innovation, transfer and dissemination of knowledge and economic development, to the mutual advantage of stakeholders, providers, holders and users of genetic resources, and traditional knowledge associated with genetic resources.

Emphasizing that no [patents] [intellectual property] on life forms, including human beings, are to be granted.]

Reaffirming, (in accordance with the Convention on 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.]

[ARTICLE 1] DEFINITIONS

TERMS USED IN THE OPERATIVE ARTICLES

[Traditional Knowledge Associated with Genetic Resources

ALT 1

“Traditional knowledge associated with genetic resources” 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.]

ALT 2

“Traditional knowledge associated with genetic resources” means substantive knowledge of the properties and uses of genetic resources held by [rightful holders, including] indigenous [people[s]] and local communities [and which directly leads to a claimed [invention] [intellectual property]] [and where, but for the traditional knowledge, the invention would not have been made].]

ALT 3

[“Traditional knowledge associated with genetic resources” means substantive knowledge of the properties and uses of genetic resources generated in a traditional context, collectively preserved and transmitted from generation to generation, held by [rightful holders, including] indigenous [people[s]] and local communities [and which directly leads to a claimed [invention] [intellectual property]] [and where, but for the traditional knowledge, the invention would not have been made].]

[Country of Origin

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

ALT

“Country of origin” is the country which first possessed genetic resources in in-situ conditions and still possesses those genetic resources.]

[[Country Providing]][Providing Country]

“Country providing/Providing country” means, [[in accordance] [consistent] 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] [consistent] with the [Convention on Biological Diversity].]

[Erroneous Grant/Granting of Patents

Erroneous grant/granting of patents means the granting of patent rights on inventions that are not novel, that are obvious, or that are not industrially applicable.]

[[Invention] Directly Based On

“[[Invention] Directly based on” means that the [subject matter][invention] [must] make [immediate] use of the genetic resource, and depend on the specific properties of the resource of which the inventor [must] have had [physical] access.]

ALT

“[Invention] Directly based on” means that the [invention] [must] make [immediate] use of the genetic resource, and the inventive concept must depend on the specific properties of the resource of which the inventor must have had physical access.]

Genetic Material

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

ALT

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

Genetic Resources

“Genetic resources” are genetic material of actual or potential value.

ALT

“Genetic resources” means any material of plant, animal, or microbial origin containing functional units of heredity of actual or potential value, and includes derivatives and genetic information thereof.

[Source

ALT 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] [Budapest depository] or botanical garden.]

ALT 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, [patent owners, universities, farmers, and plant breeders,] indigenous and local communities; and
- (ii) Secondary sources, including in particular ex-situ collections and [scientific literature].]

ALT 3

“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] [Budapest depository] or [botanical garden] or any other depository of genetic resources.]

[Utilization

“Utilization” of genetic resources means to conduct research and development, [conservation, collection, characterization, among others,] [including commercialization] on the genetic and/or biochemical composition of genetic resources, and [traditional knowledge associated with genetic resources] [including through the application of biotechnology] [as defined in Article 2 of the Convention on Biological Diversity].]

ALT

[“Utilization” of genetic resources means to conduct research and development [outside of the traditional uses by the knowledge holders] [including commercialization] on the genetic and/or biochemical composition of genetic resources and [traditional knowledge associated with genetic resources] [including through the application of biotechnology] [as defined in Article 2 of the Convention on Biological Diversity] [and to make a new product, or a new method of use or manufacturing of a product.]]]

OTHER TERMS

[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 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.]

ALT

[“Country providing genetic resources” is the country that possesses the genetic resource and/or traditional knowledge in in situ conditions and that provides the genetic resource and/or traditional knowledge.]]

[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].]

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].

Ex-Situ Conservation

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

[Misappropriation

“Misappropriation” is the [acquisition] [utilization] of genetic resources [and] [or] [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].]

ALT

[“Misappropriation” is the use of genetic resources and/or [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 and [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 and [traditional knowledge associated with genetic resources] failure to take reasonable protective measures, is not misappropriation.]

[[Physical] Access

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

[Protected Genetic Resources

“Protected genetic resources” means, genetic resources that are protected either pursuant to an intellectual property right or other legal right. Once intellectual property rights in a genetic resource expire, the genetic resource should be in the public domain and not treated as a protected genetic resource.]

[Source of Traditional Knowledge Associated with Genetic Resources

“Source of Traditional Knowledge Associated with Genetic Resources” means any source from which the applicant has acquired the traditional knowledge associated with genetic resources, including indigenous and local communities, scientific literature, publicly accessible databases, and patent applications, and patent publications. ^{4]}

[Unauthorized Use

“Unauthorized use” is the acquisition of genetic resources, [traditional knowledge associated with genetic resources] without the consent of the competent authority in accordance with national legislation of the providing country.]

⁴ This phrase does not appear verbatim in the document, but was introduced contemporaneously with the global deletion of “associated traditional knowledge” from the text. Upon reflection, it was felt that the Member State which introduced the phrase should have the opportunity to clarify its continuing relevance to the text.

[I. [MANDATORY] DISCLOSURE]

[ARTICLE 2] [OBJECTIVE]

[The objective of this instrument is to contribute to the protection of genetic resources and traditional knowledge associated with genetic resources within the [IP] [patent] system by:

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

[ARTICLE 3] [SUBJECT MATTER OF INSTRUMENT]

This instrument applies to genetic resources, and [traditional knowledge associated with genetic resources].

ALT

This instrument [shall]/[should] apply to patent applications for inventions directly based on genetic resources and traditional knowledge associated with genetic resources.]

[ARTICLE 4] [DISCLOSURE REQUIREMENT]

4.1 Where the [subject matter] [claimed invention] within a [IP] [patent] application [includes utilization of] [is directly based on] genetic resources and/or [traditional knowledge associated with genetic resources] each [Member State]/[Party] [shall]/[should] require applicants to:

- (a) Disclose the [providing country that is the country of origin] [country of origin [and]] [or [if unknown],] source of the genetic resources, and/or [traditional knowledge associated with genetic resources.]
- (b) [If the source and/or [providing country that is the country of origin] [country of origin] is not known, a declaration to that effect.]

4.2 In accordance with national law, a [Member State]/[Party] may require applicants to provide relevant information regarding compliance with ABS requirements, including PIC, [in particular from indigenous [people[s]] and local communities], where appropriate.]

ALT

4.2 The disclosure requirement of Paragraph 1 shall not include a requirement to provide relevant information regarding compliance with ABS requirements, including PIC.

4.3 The disclosure requirement [shall/should/may] [does] not place an obligation on the [IP] [patent] offices to verify the contents of the disclosure. [But [IP] [patent] offices [shall]/[should] provide guidance to [IP] [patent] applicants on how to meet the disclosure requirement.

4.4 Each [Member State]/[Party] [shall]/[should] make the information disclosed publicly available[, except for information considered confidential.⁵]

[ARTICLE 5] [EXCEPTIONS AND LIMITATIONS]

[In complying with the obligation set forth in Article 4, members may, in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such justifiable exceptions and limitations do not unduly prejudice the implementation of this instrument, or mutual supportiveness with other instruments.]

[ALT

5.1 A [IP] [patent] disclosure requirement related to genetic resources and [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];[/genetic resources when they are used as commodities];
- (d) [Traditional knowledge in the public domain];
- (e) [Genetic resources from areas beyond national jurisdictions [and economic zones]];
- (f) [All genetic resources [acquired] [accessed] before [entry into force of the Convention on Biological Diversity] [before December 29th 1993]] [entry into force of the Nagoya Protocol on October 12, 2014]; and
- (g) [Genetic resources and traditional knowledge associated with genetic resources necessary to protect human, animal or plant life or health [including public health] or to avoid serious prejudice to the environment].

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

⁵ An alternative formulation from the Nagoya Protocol Art. 14(2) is “without prejudice to the protection of confidential information”.

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

6.1 [Each [Member State]/[Party] [shall]/[should] put in place appropriate, effective and proportionate legal and administrative measures to address non-compliance with the disclosure requirement of Article 4.

6.2 Such measures [should/shall/may] include pre and/or post grant measures.

ALT

6.2 Subject to national legislation, such measures [shall/should] [may] [include, inter alia] consist of:

- (a) Pre-Grant.
 - (i) Suspending further processing of [IP] [patent] applications until the disclosure requirements are met.
 - (ii) A [IP] [patent] office considering the application withdrawn [in accordance with national law].
 - (iii) Preventing or refusing to grant an [IP right] [patent].
 - (iv) Providing an opportunity for [IP] [patent] applicants to supplement the [IP] [patent] application with additional information to disclose the source or origin of any genetic resource or traditional knowledge used. Since such information is irrelevant to how to make and use the invention, there would be no impact upon the filing date of the application and no fee required for its submission after the filing date of the application.

- (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, restorative justice, and economic compensation for holders of genetic resources, and [traditional knowledge associated with genetic resources] including indigenous peoples and/or local communities] may be considered, in accordance with national law.]]

6.3 Revocation of [an IP right] [a patent] as a sanction for non-compliance with Article 4 may be provided under national law for willful or deliberate instances of refusal to comply, but only after the [IP right] [patent] holder has been offered the opportunity to reach a mutually satisfactory resolution with relevant parties, as defined under national law, and such negotiations have failed.

ALT

6.3 Failure to fulfill the disclosure requirement [shall]/[should] not affect the validity or enforceability of granted [IP] [patent] rights.

6.4 [Member States]/[Parties] [shall]/[should] put in place adequate dispute resolution mechanisms.]

**[II. ALTERNATIVES TO ARTICLES 2-6
NO NEW DISCLOSURE REQUIREMENT]**

**ALT
[ARTICLE 2]
[OBJECTIVE]**

The objective of this instrument is to prevent the grant of patent rights on inventions that are not novel, non-obvious, and industrially applicable.

ALT

The objectives of this instrument are to:

- (a) prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources, which could protect Indigenous peoples and local communities from the limitations of the traditional use of genetic resources and their traditional knowledge associated with genetic resources that might result from the erroneous patenting thereof;
- (b) ensure that patent offices have the appropriate available information on genetic resources and traditional knowledge associated resources needed to make informed decisions on granting patents; and
- (c) preserve a rich and accessible public domain in order to foster creativity and innovation.]

**ALT
[ARTICLE 3]
[SUBJECT MATTER OF INSTRUMENT]**

This instrument [shall]/[should] apply to patent applications for inventions directly based on genetic resources and traditional knowledge associated with genetic resources.]

**ALT
[ARTICLE 4]
[DISCLOSURE]**

4.1 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 and [traditional knowledge associated with genetic resources], for reasons other than those related to novelty, inventive step, industrial applicability or enablement.]

4.2 [Where the subject matter of an invention is made using genetic resources obtained from an entity having a legal right over the genetic resource [(including a patent owner)], that entity may in the permit agreement or license granting the applicant access to the genetic resource or the right to use the genetic resource, require a patent applicant to:

(a) include within a specification of any patent application and any patent issuing thereon a statement specifying that the invention was made using the genetic resource and other relevant information, and

[(b) obtain consent for uses not encompassed within the permit agreement or license.]]

4.3 [Patent offices [shall]/[should] publish the entire disclosure of the patent on the Internet, on the date of the patent grant and [shall]/[should] also strive to make the contents of the patent application publicly accessible over the Internet.]

4.4 [Where access to a genetic resource or [traditional knowledge associated with genetic resources] is not necessary to make or use the invention, information regarding the source or origin of genetic resource or the [traditional knowledge associated with the genetic resource] can be provided at any time after the filing date of the application and without payment of a fee.]

4.5 The disclosure of the [geographic location] where the genetic material was obtained [shall]/[should]/[may][does] not place an obligation on the patent office to verify the contents of the disclosure. But patent offices [shall]/[should] provide guidance to patent applicants on how to meet the disclosure requirement as well as an opportunity for applicants or patentees to correct any disclosures that are erroneous or incorrect.

4.6 Failure to examine a patent application in a timely manner shall result in an adjustment of the term of the granted patent to compensate the patentee for administrative delays.]

[III. [DEFENSIVE]/[COMPLEMENTARY] MEASURES]

[ARTICLE 7] [DUE DILIGENCE]

[Member States]/[Parties] [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]/[parties] [shall]/[should] not be obliged to establish such databases.
- (b) Such databases [shall]/[should] be accessible to potential patent licensees [and potential investors] to confirm lawful chain of title of [protected] genetic resources upon which a patent is based.]]

[ARTICLE 8] [[PREVENTION OF THE [ERRONEOUS]⁶ GRANT OF PATENTS AND VOLUNTARY CODES OF CONDUCT]

8.1 [Member States]/[Parties] [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 and [traditional knowledge associated with genetic resources] where, under national law, those genetic resources and [traditional knowledge associated with genetic resources]:
 - (i) anticipate a claimed invention (no novelty); or
 - (ii) obviate a claimed invention (obvious or no inventive step).
- (b) Provide legal, policy or administrative measures, as appropriate and in accordance with national law, to allow third parties to dispute the validity of a patent, by submitting prior art, with regard to inventions that include genetic resources and [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 and [traditional knowledge associated with genetic resources].]
- (d) Facilitate, as appropriate, the creation, exchange, dissemination of, and access to, databases containing [information associated with] genetic resources and [traditional knowledge associated with genetic resources] for use by patent offices] [with appropriate safeguards].

[8.2 As a complement to the disclosure obligation provided for in Article 4, and in the implementation of this instrument, the [Member State]/[Party] may consider the use of databases on traditional knowledge and genetic resources in accordance with its needs, priorities, and safeguards as may be required under national laws and special circumstances.]

⁶ A Member State requested to change this title to "Protection of the Demand of the Patents". However, the facilitators do not understand the meaning of this proposal and request clarification before such a change is made.

Database Search Systems

8.3 Members are encouraged to facilitate the establishment of databases [information associated with] of genetic resources and [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 [such as filters] [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

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

8.5 [Member States]/[Parties] should provide effective, legal, policy or administrative measures, as appropriate and in accordance with national law, to implement and administer the WIPO portal.]

[IV. FINAL PROVISIONS]

[ARTICLE 9] [PREVENTIVE MEASURES FOR PROTECTION]

[Genetic resources 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 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 and [traditional knowledge associated with genetic resources] and] [with] relevant [existing] international agreements and treaties.

ALT

10.1 [This instrument should be consistent with international IP agreements. Members recognize the coherent relationships between policies that promote the granting of patents involving the utilization of genetic resources and/or [traditional knowledge associated with genetic resources] and policies that promote the conservation of biological diversity, promote access to genetic resources, and the sharing of the benefits of such genetic resources.]

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, [the Universal Declaration on Human Rights, and] Article 31 of the UN Declaration on the Rights of Indigenous Peoples.]

10.3 [No provision in this instrument shall be interpreted as harming, or being to the detriment of the rights of indigenous people enshrined in the United Nations declaration on the rights of indigenous people. In the case of a conflict of laws, the rights of indigenous people enshrined in such declaration shall prevail and any interpretation shall be guided by the provisions of such declaration.]]

[10.4 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 and [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 11] INTERNATIONAL COOPERATION

[[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 and [traditional knowledge associated with genetic resources]] [administrative disclosure of origin or source] by the international search and examination authorities under the Patent Cooperation Treaty].

ALT

[Patent examination authorities should share information related to sources of information related to genetic resources and/or traditional knowledge, especially periodicals, digital libraries and databases of information related to genetic resources and traditional knowledge. WIPO Members should cooperate in the sharing of information related to genetic resources and knowledge, including traditional knowledge, regarding the use of genetic resources.]

**[ARTICLE 12]
TRANSBOUNDARY COOPERATION**

[In instances where the same genetic resources and [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**

[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 II follows]

**The Protection of Traditional Knowledge: Draft Articles
Facilitators' Rev. 2 (August 31, 2018)⁷**

⁷ Note by the Secretariat: this text was transmitted by IGC 37 to IGC 38.

PREAMBLE/INTRODUCTION

1. ACKNOWLEDGING the **UN Declaration on the Rights of Indigenous Peoples**, and the aspirations of indigenous [peoples] and local communities [therein];
2. [[Recognizing that indigenous [peoples] and local communities have the right] Recognizing the rights of indigenous [peoples] and the interests of local communities] to maintain, control, protect and develop their intellectual property over their cultural heritage, including their traditional knowledge;]
3. Recognizing that the situation of the indigenous [peoples] and local communities varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration;
4. Recognizing that the traditional knowledge of indigenous [peoples] and local communities have [intrinsic] value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values;
5. Acknowledging that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are [intrinsically] important for indigenous [peoples] and local communities;
6. Respecting the continuing customary use, development, exchange and transmission of traditional knowledge by, within and between communities;
7. Promoting respect for traditional knowledge systems, for the dignity, cultural integrity and spiritual values of the traditional knowledge holders who conserve and maintain those systems.
8. Acknowledging that the protection of traditional knowledge should contribute toward the promotion of creativity and innovation, and to the transfer and dissemination of knowledge to the mutual advantage of holders and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.
9. [Promoting intellectual and artistic freedom, research or other fair practices and cultural exchange [based on mutually agreed terms including fair and equitable sharing of benefits and subject to the free, prior and informed consent and approval and involvement of indigenous [peoples],[local communities and nations/beneficiaries];]
10. [Ensuring mutual supportiveness with international agreements relating to the protection and safeguarding of traditional knowledge, and those relating to IP;]
11. Recognizing and reaffirming the role the IP system plays in promoting innovation and creativity, transfer and dissemination of knowledge and economic development, to the mutual advantage of stakeholders, providers and users of traditional knowledge;
12. Recognizing 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 and preserve the public domain];
13. [Recognizing 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;]

14. [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 1
USE OF TERMS

For the purposes of this instrument:

[Misappropriation] means

Alt 1

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

Alt 2

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.]

Alt 3

Any access or use of traditional knowledge of the beneficiaries in violation of customary law and established practices governing the access or use of such traditional knowledge.

Alt 4

Any access or use of traditional knowledge of the [beneficiaries] indigenous [peoples] or local communities, without their free, prior and informed consent and mutually agreed terms, in violation of customary law and established practices governing the access or use of such traditional knowledge.

[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.]

[Protected traditional knowledge] is traditional knowledge that satisfies the criteria for eligibility under Article 1 and the scope and conditions for protection under Article 3.]

Alt

[Protected traditional knowledge] is traditional knowledge that is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and is created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to

generation for a term as has been determined by each Member State, but for not less than 50 years or a period of five generations, and satisfies the scope and conditions for protection under Article 5.]

[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 for the purposes of this instrument, is knowledge that is created, maintained, and developed by indigenous [peoples], local communities, [other beneficiaries], and that is linked with, or is an integral part of, the national or social identity and/or cultural heritage of indigenous [peoples], local communities; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.]

[Alt 1

Secret traditional knowledge is traditional knowledge that is held by beneficiaries under [certain measures of] secrecy, in accordance with [customary] [national] law, and under the common understanding that the traditional knowledge is to be used and known only within the [specific group] [specifically defined group].]

[Alt 2

Secret traditional knowledge is traditional knowledge that is not generally known or readily accessible to the public; has commercial value because it is secret; and has been subject to measures to maintain secrecy of the knowledge.]

[Alt 3

Secret traditional knowledge is traditional knowledge that is held and regarded as secret by applicable indigenous [peoples] and local communities [beneficiaries] in accordance with their customary laws, protocols, practices under the understanding that the use or application of the traditional knowledge is constrained within a framework of secrecy.]

[Alt 4

Secret traditional knowledge is traditional knowledge that is not known or accessible to the public and has been subject to measures to maintain its secrecy.]

[Sacred traditional knowledge] is traditional knowledge that in spite of being secret, narrowly diffused, or widely diffused, constitutes part of the spiritual identity of the beneficiaries.]

[Narrowly diffused traditional knowledge] is [non-secret] traditional knowledge that is shared by beneficiaries amongst whom measures to keep it secret are not taken, but is not easily accessible to non-group members.]

[Widely diffused traditional knowledge] is [non-secret] traditional knowledge which is easily accessible by the public [but is still culturally connected to its beneficiaries' social identity].]

[Unlawful appropriation] is the use of [protected] traditional knowledge that has been acquired by a user from a [protected] traditional knowledge holder through improper means or a breach of confidence which results in a violation of national law in the [protected] traditional knowledge holder's country. Use of [protected] traditional knowledge that has been acquired by lawful means such as independent discovery or creation, reading publications, reverse engineering, and inadvertent or deliberate disclosure resulting from the [protected] traditional knowledge holders failure to take reasonable protective measures, is not unlawful appropriation.]

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

[["Use"/]["utilization"]] means

- (a) where the [protected] traditional knowledge is included in a product [or] where a product has been developed or obtained on the basis of [protected] 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 [protected] traditional knowledge is included in a process [or] where a process has been developed or obtained on the basis of [protected] 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 [protected] traditional knowledge in non-commercial research and development; or
- (d) the use of [protected] traditional knowledge in commercial research and development.]]

[ARTICLE 2

OBJECTIVES

[Alt 1

This instrument [should provide] [aims at protecting traditional knowledge by providing] beneficiaries with the means to:

- a. prevent the [misappropriation], [misuse], and [unauthorized use] of their traditional knowledge;
- b. encourage and protect [tradition-based] creation and innovation, whether or not commercialized;
- c. prevent the erroneous grant [or assertion] of intellectual property rights over traditional knowledge; and
- d. achieve the fair and equitable sharing of benefits arising from the use of their traditional knowledge.]

[Alt 2

The objective of this instrument is to [ensure][support] the [appropriate use] [protection] of traditional knowledge within the intellectual property system, in accordance with national law, recognizing the rights of [traditional knowledge holders][beneficiaries].]

[Alt 3

The objectives of this instrument are to:

- (a) contribute toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of [protected] traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations;
- (b) recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain; and
- (c) prevent the erroneous grant of intellectual property rights [over traditional knowledge and traditional knowledge associated with genetic resources][that are directly based on [protected] traditional knowledge obtained by unlawful appropriation].]

[Alt 4

This instrument should provide beneficiaries with the means to:

- a. prevent the misappropriation, misuse, and unauthorized use of their traditional knowledge;
- b. encourage and protect creation and innovation, whether or not commercialized, recognizing the value of public domain and the need to protect, preserve and enhance the public domain; and
- c. prevent the erroneous grant [or assertion] of intellectual property rights over traditional knowledge.]]

[ARTICLE 3

SUBJECT MATTER OF THE INSTRUMENT

[Alt 1

This instrument applies to traditional knowledge.]

[Alt 2

This instrument applies to traditional knowledge

(a) that is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4; and

(b) that has been used for a term as has been determined by each Member State, but not less than 50 years.]]

[ARTICLE 4
BENEFICIARIES

[Alt 1

The beneficiaries of this instrument are indigenous peoples, local communities, and other beneficiaries,⁸ as may be determined under national law.]

[Alt 2

Beneficiaries of [protection under] this instrument are indigenous [peoples] and local communities who hold [protected] traditional knowledge.]

[Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries, [such as states [and/or nations]], as may be determined under national law.]]

⁸ The term other beneficiaries may include states or nations.

[ARTICLE 5

SCOPE OF [AND CONDITIONS OF] PROTECTION

[Alt 1

Member States [should/shall] [safeguard] [protect] the economic and moral [interests] [rights] of the beneficiaries concerning [protected] traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, [taking into consideration exceptions and limitations, as defined in Article 9, and in a manner consistent with Article 14] [in a reasonable and balanced manner.]

[Alt 2

Member States [should/shall] safeguard the economic and moral interests of the beneficiaries concerning traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, in particular:

- (a) Where the traditional knowledge is secret, whether or not it is sacred, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
 - i. Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use.
 - ii. Beneficiaries have the moral right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- (b) Where the traditional knowledge is narrowly diffused, whether or not it is sacred, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
 - i. Beneficiaries receive a fair and equitable share of benefits arising from its use; and
 - ii. Beneficiaries have the moral right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- (c) Where the traditional knowledge is not protected under paragraphs (a) or (b), Member States [should/shall] use best endeavors to protect the integrity of traditional knowledge, in consultation with beneficiaries where applicable.]

[Alt 3

5.1 Where the [protected] traditional knowledge is secret, whether or not it is sacred, Member States [should/shall] [ensure] [encourage] that:

- (a) Beneficiaries [that directly communicate traditional knowledge to users] have the [exclusive and collective right] [possibility under national law] to maintain, control,

use, develop, authorize or prevent access to and use/utilization of their [protected] traditional knowledge; and receive a fair and equitable share of benefits arising from its use.

- (b) Users [attribute] [identify clearly discernible holders of] said [protected] traditional knowledge [to the beneficiaries], [when using said traditional knowledge], and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries [as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.]

5.2 Where the [protected] traditional knowledge is narrowly diffused, whether or not it is sacred, Member States [should/shall] [ensure] [encourage as a best practice] that:

- (a) Beneficiaries [that directly communicate [protected] traditional knowledge to users] receive a fair and equitable share of benefits arising from its use [by said users]; and
- (b) Users identify clearly-discernable holders of the [protected] traditional knowledge when using said traditional knowledge, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries [as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge].

5.3 Member States should use best endeavors [, in consultation with indigenous and local communities,] to [protect the integrity of] [archive and preserve] [protected] traditional knowledge that is widely diffused [and sacred].]

[Alt 4

5.1 Member States [should/shall] [safeguard] [protect] the economic and moral [interests] [rights] of the beneficiaries concerning [protected] traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, [taking into consideration exceptions and limitations, as defined in Article 9, and in a manner consistent with Article 14] [in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional knowledge that is 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 5BIS

[DATABASE], [COMPLEMENTARY] [AND] [DEFENSIVE] PROTECTION

Database Protection

Recognizing the importance of cooperation and consultation with indigenous and local communities in determining access to traditional knowledge, Member States should endeavor to, subject to and consistent with national and customary law, facilitate and encourage the development of the following national traditional knowledge databases to which beneficiaries may voluntarily contribute their traditional knowledge:

5BIS.1 Publicly accessible national traditional knowledge databases for the purpose of transparency, certainty, conservation, and transboundary cooperation, and to facilitate and encourage, as appropriate, the creation, exchange and dissemination of, and access to traditional knowledge.

5BIS.2 National traditional knowledge databases accessible only by intellectual property offices for the purpose of prevention of the erroneous grant of intellectual property rights. Intellectual property offices should seek to ensure that such information is maintained in confidence, except where the information is cited during the examination of an application for intellectual property protection.

5BIS.3 Non-public national traditional knowledge databases for the purpose of codifying and conserving traditional knowledge within indigenous and local communities. Non-public national traditional knowledge databases should only be accessible by beneficiaries in accordance with their respective customary laws and established practices that govern the access or use of such traditional knowledge.

[Complementary][Defensive] Protection

5BIS.4 [Member States]/[Contracting Parties] should [endeavour to], subject to and consistent with national and customary law:

- (a) facilitate/encourage the development of [publicly accessible] national traditional knowledge databases for the defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation;
- (b) [facilitate/encourage, as appropriate, the creation, exchange and dissemination of, and access to, [publicly accessible] databases of genetic resources and traditional knowledge associated with genetic resources;]
- (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 [publicly accessible] databases of traditional knowledge that are accessible to patent offices to avoid the erroneous grant of patents compile and maintain such databases in accordance with national law;
 - (ii) there should be minimum standards to harmonize the structure and content of such databases;
 - (iii) 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;]

5BIS.5 [In order to document how and where traditional knowledge is practiced, and to preserve and maintain such knowledge, efforts [should]/[shall] be made by national authorities to codify the oral information related to traditional knowledge and to develop [publicly accessible] databases of traditional knowledge.]

5BIS.6 [Member States]/[Contracting Parties] [should]/[shall] consider cooperating in the creation of such databases, especially where traditional knowledge is not uniquely held within the boundaries of a [Member States]/[Contracting Parties]. [If [protected] traditional knowledge pursuant to Article 2 is included in a database, the [protected] traditional knowledge should only be made available to others with the free, prior and informed consent or approval and involvement of the traditional knowledge holder.]

5BIS.7 Efforts [should]/[shall] also be made to facilitate access to such databases by intellectual property offices, so that the appropriate decision can be made. To facilitate such access, [Member States]/[Contracting Parties] [should]/[shall] consider efficiencies that can be gained from international cooperation. The information made available to intellectual property offices [should]/[shall] only include information that can be used to refuse a grant of cooperation, and thus [should]/[shall] not include [protected] traditional knowledge.

5BIS.8 Efforts [should]/[shall] be made by national authorities to codify the publicly accessible information related to traditional knowledge for the purpose of enhancing the development of [publicly accessible] databases of traditional knowledge, so as to preserve and maintain such knowledge.

5BIS.9 Efforts [should]/[shall] also be made to facilitate access to publicly accessible information including information made available in [publicly accessible] databases relating to traditional knowledge by intellectual property offices.

5BIS.10 [Intellectual property offices [should]/[shall] ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application.]

[ARTICLE 6

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

[Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument.]

[Alt 2

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

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

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

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

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

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

6.7 If an infringement of the rights protected by this instrument is determined in the procedure established in Paragraph 6.1, the sanctions may consider the inclusion of restorative justice measures, according to the nature and effect of the infringement.]]

[ARTICLE 7
DISCLOSURE REQUIREMENT

[Alt 1

Where required by national law, the users of traditional knowledge shall comply with requirements concerning the disclosure of source and/or origin of traditional knowledge.]

[Alt 2

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

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

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

7.4 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has failed to comply with mandatory requirements or provided false or fraudulent information.]]

[Alt 3

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

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

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

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

7.5 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has knowingly provided false or fraudulent information.]]

[Alt 4

[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.]]]

[ARTICLE 8

ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]

[Alt 1

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

[Alt 2

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

[Alt 3

Member States may establish competent authorities, in accordance with national and customary law, that are responsible for the national traditional knowledge databases provided for by this [instrument]. Responsibilities may include the receipt, documentation, storage and online publication of information relating to traditional knowledge.]]

[ARTICLE 9

EXCEPTIONS AND LIMITATIONS

[Alt 1

In complying with the obligations set forth in this instrument, Member States [may in special cases,] [should] adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries nor unduly prejudice the implementation of this instrument.]

[Alt 2

General Exceptions

9.1 [Member States]/[Contracting Parties] [may] [should] adopt appropriate limitations and exceptions under national law [with the free, prior and 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.]]

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

Specific Exceptions

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

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

- a. to exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

This provision, with the exception of Subparagraph (c), [should]/[shall] not apply to traditional knowledge described in Article 5(a)/5.1.]

9.4 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.]

9.5 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 5 shall not apply to any use of knowledge that:]

- (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.]

9.6 [[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 free, prior and 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.]]

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

[Alt 3

In complying with the obligations set forth in this instrument, Member States may adopt exceptions and limitations as may be determined under national and customary law.]]

ARTICLE 10

TERM OF PROTECTION/RIGHTS

[Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional knowledge in accordance with [Article 5/[which may] [should]/[shall] last as long as the traditional knowledge fulfills/satisfies the [criteria of eligibility for protection] according to Article [3]/[5].]

ARTICLE 11
FORMALITIES

[Alt 1

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

[Alt 2

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

[Alt 3

[The protection of traditional knowledge under Article 5 [should]/[shall] not be subject to any formality. However, in the interest of transparency, certainty and the conservation of traditional knowledge, the relevant national authority (or authorities) or intergovernmental regional authority (or authorities) may maintain registers or other records of traditional knowledge to facilitate protection under Article 5.]]

ARTICLE 12

TRANSITIONAL MEASURES

12.1 These provisions [should]/[shall] apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article [3]/[5].

[Optional addition

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

[Alternative

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

[Alternative

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

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

[ARTICLE 13

RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS

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

[13.2 Nothing in this instrument shall be interpreted as prejudicing or detrimental to the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.]

[13.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretation shall be guided by the provisions of the said Declaration.]

ARTICLE 14
NON-DEROGATION

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 15

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 3, accord within its territory to beneficiaries of protection as defined in Article 4, whose members primarily are nationals of or are domiciled in the territory of, any of the other [Member States]/[Contracting Parties], the same treatment that it accords to its national beneficiaries.]

[End of alternative]

[ARTICLE 16

TRANSBOUNDARY COOPERATION

Where the same [protected] traditional knowledge [under Article 5] is found within the territory of more than one [Member State]/[Contracting Party], or is shared by one or more indigenous and local communities in several [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objectives of this [instrument].]

[Annex III follows]

**The Protection of Traditional Cultural Expressions: Draft Articles
Facilitators' Rev. 2 (August 31, 2018)⁹**

⁹ Note by the Secretariat: this text was transmitted by IGC 37 to IGC 38.

PREAMBLE/INTRODUCTION

1. ACKNOWLEDGING the **UN Declaration on the Rights of Indigenous Peoples**, and the aspirations of indigenous [peoples] and local communities [therein];
2. [[Recognizing that indigenous [peoples] and local communities have the right] Recognizing the rights of indigenous [peoples] and the interests of local communities] to maintain, control, protect and develop their intellectual property over their cultural heritage, including their traditional cultural expressions;]
3. Recognizing that the situation of the indigenous [peoples] and local communities varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration;
4. Recognizing that the traditional cultural expressions of indigenous [peoples] and local communities have [intrinsic] value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values;
5. Acknowledging that traditional cultural expressions are frameworks of ongoing creation and distinctive intellectual and creative life that are [intrinsically] important for indigenous [peoples] and local communities;
6. Respecting the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;
7. Promoting respect for traditional cultural expressions, and for the dignity, cultural integrity and spiritual values of the traditional cultural expression holders who maintain those expressions.
8. Acknowledging that the protection of traditional cultural expressions should contribute toward the promotion of creativity and innovation, and to the transfer and dissemination of traditional cultural expressions for the mutual advantage of holders and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.
9. [Promoting intellectual and artistic freedom, research or other fair practices and cultural exchange [based on mutually agreed terms including fair and equitable sharing of benefits and subject to the free, prior and informed consent, and approval and involvement of indigenous [peoples],[local communities and nations/beneficiaries];]
10. [Ensuring mutual supportiveness with international agreements relating to the protection and safeguarding of traditional cultural expressions, and those relating to IP;]
11. Recognizing and reaffirming the role that the IP system plays in promoting innovation and creativity, transfer and dissemination of traditional cultural expressions and economic development, to the mutual advantage of stakeholders, providers and users of traditional cultural expressions.
12. Recognizing the value of a vibrant public domain and the body of traditional cultural expressions that are available for all to use, [and] which are essential for creativity and innovation [and the need to protect and preserve the public domain].

13. [Recognizing the need for new rules and disciplines concerning the provision of effective and appropriate means for the enforcement of rights relating to traditional cultural expressions, taking into account differences in national legal systems;]
14. [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 1
USE OF TERMS

For the purposes of this instrument:

[Alt 1

Traditional cultural expression means any form of [creative or spiritual] [artistic and literary] expression, tangible or intangible, or a combination thereof, such as actions¹⁰, materials¹¹, music and sound¹², or verbal forms¹³, as well as their adaptations, which may subsist in written/codified, oral or other form], that is created, generated, expressed or maintained [in a collective context] by indigenous [peoples] and local communities; that is the unique product of and/or [directly] linked with the cultural and/or social identity and cultural heritage of indigenous [peoples] and local communities; that may be dynamic and evolving; and that is transmitted from generation to generation, whether consecutively or not.]

[Alt 2

Traditional cultural expression means any form of [creative or spiritual] [artistic and literary] expression, tangible or intangible, or a combination thereof, such as actions¹⁴, materials¹⁵, music and sound¹⁶, or verbal forms¹⁷, as well as their adaptations, which may subsist in written/codified, oral or other form], that is created, generated, expressed or maintained [in a collective context] by indigenous [peoples] and local communities; that is the unique product of and/or [directly] linked with the cultural and/or social identity and cultural heritage of indigenous [peoples] and local communities; that may be dynamic and evolving; that have been used for a term as has been determined by each [Member State]/ [Contracting Party] but not less than 50 years/or a period of five generation; and that is transmitted from generation to generation, whether consecutively or not.]

[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.]

[Alternative

¹⁰ [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.]

¹¹ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

¹² [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

¹³ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

¹⁴ [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.]

¹⁵ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

¹⁶ [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

¹⁷ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

Public domain means the public domain as defined by national law.]

[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.]]

[ARTICLE 2
OBJECTIVES

[Alt 1

This instrument should provide beneficiaries with the means to:

- (a) prevent the misappropriation, misuse, and unauthorized use of their traditional cultural expressions;
- (b) encourage and protect creation and innovation, whether or not commercialized;
- (c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions; and
- (d) achieve the fair and equitable sharing of benefits arising from the use of their traditional cultural expressions.]

[Alt 2

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, [and to recognize][recognizing] the rights of [beneficiaries] [indigenous [peoples] and local communities].]

[Alt 3

This instrument should provide beneficiaries with the means to:

- (a) prevent the misappropriation, misuse, and unauthorized use of their traditional cultural expressions;
- (b) encourage and protect creation and innovation, whether or not commercialized, recognizing the value of public domain and the need to protect, preserve and enhance the public domain; and
- (c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.]]

[ARTICLE 3

[ELIGIBILITY CRITERIA FOR [PROTECTION]/[SAFEGUARDING]]/[SUBJECT MATTER OF
[THE INSTRUMENT]/[PROTECTION]]

[Alt 1

This instrument applies to traditional cultural expressions.]

[Alt 2

This instrument applies to traditional cultural expressions

(a) that is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4; and

(b) that has been used for a term as has been determined by each Member State, but not less than 50 years.]

[ARTICLE 4
BENEFICIARIES

[Alt 1

The beneficiaries of this instrument are indigenous peoples, local communities, and other beneficiaries,¹⁸ as may be determined under national law.]

[Alt 2

Beneficiaries of protection under this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.]

[Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries, [such as states [and/or nations]], as may be determined under national law.]]

¹⁸ The term other beneficiaries may include states or nations.

[ARTICLE 5

SCOPE OF [PROTECTION]/[SAFEGUARDING]

[Alt 1

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

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

[Alt 2

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.

5.2 Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.

5.3 Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.]

[Alt 3

Option 1

5.1 Where the [protected] traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

- (a) 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 [protected] traditional cultural expressions;

- ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret [protected] traditional cultural expressions;
 - iii. [authorize or deny the access to and use/[utilization] of said [protected] traditional cultural expressions based on free, prior and informed consent or approval and involvement and mutually agreed terms;]
 - 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 otherwise diminishes its cultural significance to the beneficiary.
- (b) encourage users [to]:
- i. attribute said [protected] traditional cultural expressions to the beneficiaries;
 - ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions]; and
 - iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions.

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

- (a) attribute and acknowledge the beneficiaries as the source of the [protected] traditional cultural expressions, unless the beneficiaries decide otherwise, or the [protected] traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]
- (b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions;
- (c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions[; and][.]]
- (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.]

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

- (a) attribute said [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 [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.]

Option 2

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

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

5.3 Protection/safeguarding under this instrument(s) does not extend to uses of [protected] traditional cultural expressions: (1) for archival, uses by museums, preservation, research and scholarly uses, and cultural exchanges; and (2) to create literary, artistic, and creative works that are inspired by, borrowed from, derived from, or adapted from [protected] traditional cultural expressions.]]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

[Alt 1

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

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

[Alt 2

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument].

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

[ARTICLE 7
EXCEPTIONS AND LIMITATIONS

[Alt 1

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.]

[Alt 2

In implementing this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.
2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:
 - (a) learning teaching and research;
 - (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
 - (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.
3. A Member State may provide for exceptions and limitations [other than] [in addition to] those permitted under paragraph (2).
4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a [protected] traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.]

[Alt 3

In [complying with the obligations set forth in]/[implementing] this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.]

[Alt 4

General Exceptions

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

- (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

7.1 [[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]

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

Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

- (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 5.1.]]

7.4 [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) 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.]]

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

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

[Option 1

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

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

[Option 2

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

[Option 3

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

[ARTICLE 9]
FORMALITIES

[Option 1

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

[Option 2

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

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

[ARTICLE 10

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

[Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.]

[Alt 2

10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.]

[Alt 3

Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.]

[Alt 4

Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.]]

[ARTICLE 11]

[TRANSITIONAL MEASURES

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

[11.2 *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]].]

[11.2 *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].]

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

[ARTICLE 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

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

[12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]

[ARTICLE 13]

[NATIONAL TREATMENT]

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

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13
NO SUCH PROVISIONS]

[ARTICLE 14]

[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 15

[CAPACITY BUILDING AND AWARENESS RAISING

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

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

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

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

[End of Annex III and of document]