

## **WIPO General Assembly**

### **Forty-First (21<sup>st</sup> Extraordinary) Session Geneva, October 1 to 9, 2012**

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

*Document prepared by the Secretariat*

#### **INTRODUCTION**

1. The WIPO General Assembly at its Fortieth (20<sup>th</sup> Ordinary) session in September 2011 agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2012-2013 biennium.
2. The IGC's mandate for the 2012-2013 biennium, which was set out in document WO/GA/40/7, provides as follows:

Bearing in mind the Development Agenda recommendations, the WIPO General Assembly [at its Fortieth (20<sup>th</sup> Ordinary) session in September 2011] agrees that the mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore be renewed as follows:

- (a) The Committee will, during the next budgetary biennium (2012/2013), and without prejudice to the work pursued in other fora, expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.
- (b) The Committee will follow, as set out in the [table below], a clearly defined work program, based on sound working methods, for the 2012/2013 biennium. This work

program will make provision initially for four sessions of the IGC, three of which will be thematic, as detailed in the future work program of the IGC, taking into account sub paragraph (d) with regard to the possible consideration by the General Assembly in 2012 of the need for additional meetings.

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

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

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

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

<b>Date</b>	<b>Activity</b>
February 2012	IGC 20 (GRs). Undertake text based negotiations with a focus on considering options for a draft legal text as detailed in WIPO/GRTKF/IC/19/7. In developing this text, the IGC should also carefully consider texts already submitted by Members. Duration 8 days, including Saturday.
April/May 2012	IGC 21 (TK). Focus on 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions.
July 2012	IGC 22 (TCEs). Focus on 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions
September 2012	WIPO General Assembly

2013	IGC 23. Consider decision of General Assembly and take stock of further work required to finalize the text/s.
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### IGC SESSIONS IN 2012

3. Pursuant to the mandate for the 2012-2013 biennium, and as indicated in the work program referred to in the mandate, the IGC met three times in 2012, as follows:

- (a) IGC 20, from February 14 to 22, 2012, on the subject of genetic resources (GRs);
- (b) IGC 21, from April 16 to 20, 2012, on the subject of traditional knowledge (TK); and,
- (c) IGC 22, from July 9 to 13, 2012, on the subject of traditional cultural expressions (TCEs).

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

5. In this regard, the three sessions of the IGC that took place in 2012 took the following decisions:

(a) IGC 20 (GRs): “The Committee discussed all the working and information documents prepared for this session under this Agenda Item, in particular documents WIPO/GRTKF/IC/20/4, WIPO/GRTKF/IC/20/5, WIPO/GRTKF/IC/20/6, WIPO/GRTKF/IC/20/INF/4, WIPO/GRTKF/IC/20/INF/8, WIPO/GRTKF/IC/20/INF/9, WIPO/GRTKF/IC/20/INF/10, WIPO/GRTKF/IC/20/INF/11, WIPO/GRTKF/IC/20/INF/12, WIPO/GRTKF/IC/20/INF/13 and WIPO/GRTKF/IC/20/INF/14. The Committee developed, on the basis of these documents and comments made in plenary, the “Consolidated Document Relating to Intellectual Property and Genetic Resources” in accordance with the General Assembly mandate contained in document WO/GA/40/7. The Committee decided that this text, as at the close of the session on February 22, 2012 [(copy attached)], be transmitted to the WIPO General Assembly for consideration by the General Assembly in accordance with the Committee’s mandate contained in document WO/GA/40/7.”<sup>1</sup>

(b) IGC 21 (TK): “The Committee discussed all the working and information documents prepared for this session under this Agenda item, in particular documents WIPO/GRTKF/IC/21/4, WIPO/GRTKF/IC/21/5, WIPO/GRTKF/IC/21/INF/4 and WIPO/GRTKF/IC/21/INF/8. The Committee developed, on the basis of these documents and comments made in plenary, the text “The Protection of Traditional Knowledge: Draft Articles” in accordance with the General Assembly mandate contained in document WO/GA/40/7. The Committee decided that this text, as at the close of the session on April 20, 2012, be transmitted to the WIPO General Assembly for consideration

<sup>1</sup> WIPO/GRTKF/IC/20/10, para 714

by the General Assembly in accordance with the Committee's mandate contained in document WO/GA/40/7.”<sup>2</sup>

(c) IGC 22 (TCEs): “The Committee discussed the working and information documents prepared for this session under this agenda item, in particular documents WIPO/GRTKF/IC/22/4, WIPO/GRTKF/IC/22/5, WIPO/GRTKF/IC/22/INF/4 and WIPO/GRTKF/IC/22/INF/8. The Committee developed, on the basis of these documents and comments made in plenary, the text “The Protection of Traditional Cultural Expressions: Draft Articles” in accordance with the General Assembly mandate contained in document WO/GA/40/7. The Committee decided that this text, as at the close of the session on July 13, 2012, be transmitted to the WIPO General Assembly for consideration by the General Assembly in accordance with the Committee's mandate contained in document WO/GA/40/7.”<sup>3</sup>

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

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

7. 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 22 also discussed the contribution of the IGC to the implementation of the Development Agenda Recommendations.

8. In this regard, the following statements were made at IGC 22. These will also appear in the initial draft report of IGC 22 (WIPO/GRTKF/IC/22/6 Prov.), which will be made available, as requested by the IGC, by September 30, 2012:

“The Delegation of Brazil, speaking on behalf of the Development Agenda Group (DAG), noted that the Development Agenda was expected to guide activities, not only of the IGC, but of WIPO as a whole. With particular reference to the IGC, the Group recalled recommendation 18 which urged the Committee to accelerate the process on the protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs). It also recalled the importance of recommendation 15 with respect to norm-setting activities as a general guideline for the negotiations being carried out. It pointed out that since 2007, the IGC had engaged in meaningful work towards the attainment of its objectives. The Committee had produced working texts covering the three areas of its negotiation, and the General Assembly had given ambitious mandates in 2009 and 2011. As a result of the mandate given by the General Assembly in 2011, the IGC had convened three times in 2012, to focus thematically on negotiations on GRs, TK and TCEs, respectively. The meetings provided an opportunity for Member States to further share their views and make progress on the working texts. The Group, however, expressed its concerns over the pace of negotiations and noted that despite the progress made in the three areas of work, it was time to endeavor to strengthen efforts with a view to concluding the negotiations and fulfilling the mandate of the General Assembly.

<sup>2</sup> WIPO/GRTKF/IC/21/7 Prov. 2, para 537

<sup>3</sup> Decision on Agenda item 6, see

[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_22/wipo\\_grtkf\\_ic\\_22\\_ref\\_decisions.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_ref_decisions.doc)

The Group explained that the adoption of a binding treaty or treaties was important in providing effective protection against the misappropriation of GRs, TK and TCEs. It was of the view that the protection and sustainable use of GRs, TK and TCEs could only be adequately addressed through the establishment of international rules and obligations that guaranteed the implementation of principles and objectives of the Convention on Biological Diversity (CBD), and 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 (Nagoya Protocol). It noted that the lack of commitment by WIPO Member States to the negotiations was unacceptable if an effective outcome was to be reached. It pointed out that the IGC had been working on the three issues for over a decade, and stressed that it could not wait another decade before an agreement that fulfilled the mandate of the Development Agenda was reached. In order to achieve a truly inclusive intellectual property (IP) system, the Group stressed the importance of identifying solutions from which all Member States could benefit. It further pointed out that the issues and negotiations in the Committee were of special relevance to developing countries and least developed countries (LDCs) and, therefore, urged Member States to pursue the speedy conclusion of the negotiations for the benefit of developing countries and LDCs in line with the principles and objectives of the Development Agenda.

“The Delegation of South Africa, speaking on behalf of the African Group, provided an assessment of the contribution of the IGC to the implementation of the respective Development Agenda recommendations. It noted that the IGC, under the Development Agenda, was requested to accelerate the process on the protection of GRs, TK and TCEs. It recalled that the 2011 WIPO General Assembly mandate of the IGC, in the biennium 2012-2013, was to “expedite its work on text-based negotiations with the objective of reaching agreement on a text or texts of an international legal instrument or instruments which will ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions”. To aid the work of the IGC, it explained that three thematic sessions for GRs, TK and TCEs were agreed to be held in the first half of 2012. The Group expressed its appreciation for the progress made in the work of the Committee this year and noted, in particular, the efforts of the Committee in developing a draft legal text for GRs. It pointed out that it had wished for the thematic sessions to accelerate the negotiations with a view to completing the legally binding instruments. It further welcomed the fact that the 2012 WIPO General Assembly would have the opportunity to assess the progress on the text of the international legal binding instrument(s) on GRs, TK and TCEs as transmitted to it by the Committee, with a view to agreeing on the way forward, especially regarding the convening of a Diplomatic Conference. It expressed its expectation that, in taking stock of the text on the three instruments, the General Assembly would make a landmark decision to ensure that the Committee completed its work towards the effective protection of GRs, TK and TCEs. It noted that a lot of technical work and discussions had already taken place over the past decades, and expressed the view that what remained was the political will of all Member States to conclude the work of the IGC. It urged all Member States to commit to the conclusion of the work of the IGC. In conclusion, the Delegation stated that it expected the Committee to adhere to implementing the relevant Development Agenda recommendations and also to adhere to the mandate given to it by the General Assembly which, it noted, was the highest decision-making body in WIPO.

“The Delegation of the European Union, speaking on behalf of the European Union and its Member States, recalled that a number of recommendations of the Development Agenda were relevant to the IGC, in particular recommendation 18, which emphasized that the work of the IGC on GRs, TK and TCEs was without prejudice to any outcome. The Delegation was of the view that any instrument agreed upon should be flexible, sufficiently clear, and non-binding. It similarly reaffirmed its preference for separate texts. It expressed satisfaction that the IGC had witnessed continued progress in its negotiations over the last semester. It, however, believed that further substantive work on the texts

was required so as to fulfill the mandate of the Committee. It noted that the norm-setting activities within the IGC had been member-driven and involved a participatory process which took into consideration the interests and priorities of all IGC members and the viewpoints of other stakeholders, including accredited intergovernmental organizations and non-governmental organizations (NGOs), in line with recommendation 15. The norm-setting process, according to the Delegation, had considered the boundaries, roles and contours of the public domain as required in recommendations 16 and 20, and had taken into account flexibilities in international IP agreements, as required in recommendation 17. It further noted that the WIPO Voluntary Fund for Accredited Indigenous and Local Communities, which had facilitated participation of the observers in the IGC sessions, as well as activities of the Indigenous Consultative Forum and the IGC Indigenous Panel, should be mentioned in the context of recommendation 42, which referred to the wide participation of civil societies at large in WIPO activities, in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review. With respect to recommendation 42, the Delegation also referred to the discussions held in plenary on the participation of observers which, it noted, had led to a number of decisions at IGC 20. The Delegation noted that it looked forward to another productive year for the IGC in 2013.

“The Delegation of Italy, speaking on behalf of Group B, made reference to recommendations 15, 16, 17, 18 and 20, noting that the IGC had accomplished important progress in the present year in its work on GRs, TK and TCEs. Further work, however, remained to be done in order to fulfill the mandate of the Committee. The Group considered it essential that such work remained member-driven, inclusive, participatory, and took into account the interests and priorities of all WIPO Member States, and the viewpoints of other stakeholders, including accredited intergovernmental organizations and NGOs. It said that it was also important that the Committee continued to consider the preservation of a robust, rich and accessible public domain, and the obligations and flexibilities in international IP agreements as they may be relevant.

“The Delegation of Iran (Islamic Republic of), speaking on behalf of the Asian Group, was of the view that development objectives were at the heart of the IGC, and the 45 recommendations of WIPO Development Agenda were immediately relevant to its on-going work. It was happy to see that the Committee had implemented the various Development Agenda recommendations, especially in the area of norm-setting as stipulated in cluster B. It believed that WIPO’s norm-setting activities in this area could be supportive of the development goals in countries, and could have a direct linkage with their development. It observed that, at the moment, there was no binding rule or convention to preserve the moral and economic rights of the beneficiaries of TK, TCEs and GRs. In the absence of internationally binding rules for the effective protection of TK, TCEs and GRs, bio-piracy and misappropriation of GRTKF for commercial benefit had become a prevalent phenomena all over the world, particularly in developing countries. This rather unfortunate and rampant situation continued to deprive developing countries of greater leverage over the use of their potential resources resulting in undermining their sustainable development and competitiveness in the international market. It advised that the only way to remedy this unfair situation was by establishing new international norms and binding rules to help developing countries protect their potential resources in order to utilize and commercialize them at the international level for the benefit of their people. The new mandate of the IGC provided a new momentum to the fulfillment of a long-standing aspiration of developing countries in pursuing a binding instrument on GRTKF. The constructive engagement of Member States had led to the drafting of three consolidated texts which reflected all views and opinions. It noted that it would be important that the Committee kept the momentum and tried to solve the remaining divergences, with a view to holding a Diplomatic Conference in the near future. It stressed that the adoption of a new treaty in this area would send a clear message to developing countries that their needs and requirements in the IP system had been taken into account.

Such a trend could move IP rights towards a more balanced direction, and would increase the interests of developing countries in the IP system, provide an enabling environment for development in these countries and play an outstanding role in enhancing their economies through the use of IP. Consequently, it would increase the contribution of the developing countries in the global economy and global cultural partnership. It also said that although most of the developing countries were rich in TCEs, TK and GRs, they needed technical assistance in terms of developing coherent national systems to preserve their resources at the national and international level. The WIPO Secretariat was invited to provide technical assistance to developing countries, in order to enable them to formulate their national law protection systems, as well as develop strategies for commercialization of TK and TCEs for the benefit of their beneficiaries, in parallel with on-going negotiations in IGC. It also invited the Committee on Development and Intellectual Property (CDIP) to build on the South-South corporation project to assist different countries in formulating their national strategies in accordance with their needs and requirements.

“The Delegation of the United States of America, in expressing its support for the intervention made by the Delegation of Italy, speaking on behalf of Group B, said that it supported the adoption of a non-binding international instrument pursuant to the current mandate of the WIPO General Assembly - one that was faithful to the WIPO Development Agenda, and recommendation 18, and that did not prejudge any outcome. In particular, it believed the Committee must respect those recommendations that call on WIPO to consider both costs and benefits to maintaining a rich and accessible public domain, and to take into account flexibilities in the international instruments. It thought that was necessary in order to preserve the policy space of Members on these complicated topics. It further stressed that one of the fundamental underpinnings of the WIPO Development Agenda, the notion that one-size-fits-all, was not the desired approach, and that policy space must be preserved. Just as existing norms on IP preserved such policy space by respecting a robust public domain and flexibilities, it believed that the Committee’s work on TCEs, TK and GRs must also avoid movement towards a one-size-fits-all system.

“The Delegation of India associated itself with the statements made by the Delegations of Brazil, speaking on behalf of the DAG and Iran (Islamic Republic of), speaking on behalf of the Asian Group, and expressed its support of the implementation of the mainstreaming of the Development Agenda recommendations, adopted by the WIPO General Assembly in 2007, in all areas of WIPO. It emphasized that the recommendations of the Development Agenda must guide the activities of the IGC as such. It further recalled recommendation 18, which required the IGC to accelerate the process in the protection of GRs, TK and TCEs without prejudice to any specific outcome, including the possible development of an international instrument(s). It looked forward to an early and positive conclusion of a binding international legal instrument on all the three on-going norm-setting initiatives in the IGC, as mandated by the 2011 WIPO General Assembly. It finally affirmed its Delegation’s continued commitment to engaging in the forthcoming discussions in the Committee, and looked forward to substantive progress.

[Note from the Secretariat: The following statements were submitted in writing form and not delivered orally].

“The Delegation of Argentina noted that the work of the IGC, as well as that of all the competent bodies of WIPO, needed to take into account the Development Agenda recommendations, in particular, through the mechanism approved at the 2010 General Assembly. It noted that the matter being addressed by the IGC was closely related to the general principles of the WIPO Development Agenda and, more specifically, to recommendation 18, which urged that the process on the protection of GRs, TK and TCEs be accelerated, without prejudice to any specific outcome, including the possible development of an international instrument(s). The Delegation expressed its interest

in the progress made in terms of the work carried out and the substantive endeavors of the Committee, which were aimed at producing greater agreement on what was a multi-faceted issue. It noted that the negotiations within WIPO were a positive development, given that there was need for a debate concerning a reference framework within which IP rights could be deemed to be linked to TCEs, and which allowed the users and providers of such expressions to receive greater legal reassurance concerning access to and distribution of the benefits arising from their use.

“The Delegation of Algeria expressed its support for the statements made by the Delegations of South Africa and Brazil, speaking on behalf of the African Group and DAG, respectively. It said that its Delegation took positive note of the fact that the 2010 General Assembly’s decision on the implementation of the monitoring and reporting mechanism of the WIPO Development Agenda was being applied by the Committee. It looked forward to seeing all the relevant WIPO bodies reporting substantially on their contribution towards the implementation of the Development Agenda recommendations. It believed that this was the best tool that would ensure that the “development dimension” was fully integrated in the work of WIPO. More particularly, it was pleased that the IGC was currently undertaking text-based negotiations with the objective of concluding an appropriate international legal instrument(s) for the protection of TK, TCEs and GRs, adding that the three thematic sessions of the Committee had been very useful in expediting the work of the IGC, as mandated by the 2011 General Assembly. It was, therefore, of the view that the current negotiation process was, to a certain extent, in line with the Development Agenda recommendation 18, that urged the IGC “to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.” It, however, believed that a strong commitment from all delegations was still needed to achieve the spirit of the Development Agenda recommendations, especially recommendations 18, 15 and 21. In conclusion, it said that the Committee could count on the Delegation commitment”.

*9. The WIPO General Assembly is, in line with the IGC’s mandate for the 2012-2013 biennium, invited to take stock of and consider the texts, progress made and decide on convening a Diplomatic Conference, and consider the need for additional meetings, taking account of the budgetary process.*

[Annexes follow]

**Date: February 22, 2012**

**Consolidated Document Relating to Intellectual Property  
and Genetic Resources**

## Chairman's Note

This text represents the results, at the conclusion of the IGC's 20<sup>th</sup> session, in accordance with the mandate of the WIPO General Assemblies (contained in WO/GA/40/7). It represents a work in progress and is without prejudice to the positions of the participants.

Where one or more options are presented on any issue it is understood that the possibility remains for there to be a **no** option or additional options on the issues.

The titles by the facilitators<sup>4</sup> that are used are indicative of the content only and they do not form a framework for the document.

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<sup>4</sup> Facilitators titles are boxed.

## **INTELLECTUAL PROPERTY AND THE PROTECTION OF GENETIC RESOURCES [THEIR DERIVATIVES] AND ASSOCIATED TRADITIONAL KNOWLEDGE: NEGOTIATING TEXT**

### **LIST OF TERMS**

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

Option 1. “Associated Traditional knowledge” means knowledge which is dynamic and evolving, generated in a traditional context, collectively preserved and transmitted from generation to generation including but is not limited to know-how, skills, innovations, practices and learning, that subsist in genetic resources.

Option 2. “Traditional knowledge” means the content or substance of knowledge that is the result of intellectual activity and inside a traditional context and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems.

Option 3. “Traditional knowledge related to genetic resources” as it is understood in the CBD and related instruments and the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization (ITPGRFA). As a measure under patent law, the focus is on traditional knowledge that can give rise to a technical invention.]

#### **Biotechnology**

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

#### **Country of Origin**

Option 1 . “Country of origin” is the country which possesses those genetic resources in in-situ conditions.

Option 2. Country Providing/Providing Country - In accordance with Article 5 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, a “providing country” is the country of origin or that has acquired the genetic resources and/or that has accessed the traditional knowledge in accordance with the Convention on Biological Diversity.

Option 3. “Country providing genetic resources” is the country supplying genetic resources collected from in-situ sources, including populations of both wild and domesticated species, or taken from ex-situ sources, which may or may not have originated in that country.

#### **[Derivative**

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

#### **Genetic Material**

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

## **Genetic Resources**

Option 1 - "Genetic Resources" are genetic material of actual or potential value.

Option 2 - "Genetic resources" as it is understood in the CBD and related instruments and the International Treaty on Plant Genetic Resources for Food and Agriculture.

## **In situ conditions**

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

## **Internationally Recognized Certificate of Compliance**

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

## **Physical Access**

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

## **Source**

Option 1. "Source" refers to any source from which the applicant has acquired the genetic resource other than the country of origin, such as a research center, gene bank or botanical garden.

Option 2 . "Source" should be understood in its broadest sense possible:

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

## **Utilization**

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

## **POLICY OBJECTIVES**

<b>OBJECTIVE 1: Compliance with International/National laws relating to prior informed consent, mutually agreed terms, ABS laws and disclosure<sup>5</sup></b>
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1. Ensure [applicants for intellectual property rights [patents] involving the utilization of genetic resources [their derivatives] and associated traditional knowledge] [those accessing [and/or using]] genetic resources [,their derivatives] and associated traditional knowledge

<sup>5</sup> Boxed and/or bolded headings are Facilitators text to enhance clarity in the document.

comply with [international rights and national legislations [national law and relevant conditions for [requirements<sup>6</sup> of the country providing<sup>7</sup> for prior informed consent, mutually agreed terms, fair and equitable] access and benefit-sharing [and disclosure of origin.]

## **Guiding Principles Objective 1**

### **1.1. Roles and Rights of [States, Nations, Indigenous Peoples, Local Communities and right owners].**

1.1.1 Option 1. Recognize [the wide variety of kinds of [ownership] arrangements pertaining to] [sovereign rights of States] over genetic resources [, their derivatives] and associated traditional knowledge [, including the sovereign rights of [States] nations and peoples, the rights of indigenous peoples and local communities, [as well as private property rights]] in accordance with domestic legislation [in patent applications].

1.1.2 Option 2.[Sovereign States have the authority to determine access to genetic resources in their jurisdiction. Subject to national legislation, persons accessing traditional knowledge associated with genetic resources from the knowledge [holder(s)] [owners] and applying that knowledge in the development of an invention should obtain approval from the knowledge [holder(s)] [owners] and seek their involvement.]

1.1.3 Option 3. To ensure respect for [the sovereign rights of peoples partially or entirely under occupation] over their genetic resources and associated traditional knowledge, including the principle of prior informed consent and mutually agreed terms and total and effective participation.

### **1.2 Respect for Rights of Indigenous Peoples and Local communities.**

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

### **1.3 Procedural Burden.**

[To ensure that patent applicants are not burdened with unreasonable procedures for relevant conditions for access, use and benefit-sharing under national law] when seeking patent protection.]

### **1.4 [Transparency in ABS].**

A requirement in national and international patent applications to disclose the source would increase transparency in access and benefit sharing with regard to genetic resources and traditional knowledge].

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<sup>6</sup> National law and requirements include customary norms.

**OBJECTIVE 2: Prevent [intellectual property rights] [patents] from being granted in error [in bad faith].**

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

- (a) [ [in error for inventions that are not novel [new] or inventive] [that do not satisfy the patentability criteria];
- (b) [where there is no prior informed consent, mutually agreed terms [and [/or] fair and equitable benefit-sharing, and disclosure of origin] or related national law and requirements are not satisfied; and
- (c) [or that was granted in violation of the inherent rights of the original owners].

**Guiding Principles Objective 2**

**2.2. Certainty of Rights.**

2.2.1 Option 1. The [intellectual property] [patent] system should provide certainty of rights for legitimate users<sup>8</sup> and providers of genetic resources, [their derivatives] and/or associated traditional knowledge.

2.2.2 Option 2. The patent system should provide certainty of rights for users of genetic resources and traditional knowledge and shall not impose requirements that detract from legal certainty such as mandatory disclosure requirements relating to genetic resources and traditional knowledge.

**2.3 Compliance with Patentability Requirements.**

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

**2.4 [Compliance with disclosure, prior informed consent and fair and equitable benefit sharing requirements.**

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

**2.5 [Disclosure Requirements.**

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

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<sup>8</sup> This requires a definition.

## **2.6 Mutual Trust:**

[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. 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 patent system.]

## **2.7 Patents on Life Forms<sup>9</sup>**

2.7.1 Option 1. Ensure that no patents on life and life forms are granted for genetic resources and associated traditional knowledge.

2.7.2 Option 2. Enhance the availability of patent protection for life forms and new uses for known substances in order to create benefits and support benefit-sharing from the use of genetic resources and associated traditional knowledge.

### **OBJECTIVE 3: Ensuring intellectual property [patent] offices have the required information to make proper decisions in granting intellectual property [patent] rights.**

3. Ensure that [[intellectual property] [Patent] offices] the office that has responsibility for [processing and/or management of] examining [intellectual property and] [patent] applications [should] have [access to] [all] the appropriate information [on genetic resources, [their derivatives] and/or associated traditional knowledge] needed to make proper and informed decisions in granting [intellectual property rights] [patents].

### **Guiding Principles Objective 3**

#### **3.1 Prior Art**

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

#### **3.2 Applicant(s) Disclosure Requirement**

3.2.1 Option 1. [Intellectual property] [Patent] an applicant[s] [should] must disclose all background information of genetic resources, [their derivatives] and associated traditional knowledge relevant for determining the eligibility conditions. Such information shall include confirmation through the mandatory disclosure requirements that prior informed consent has been obtained and access has been granted on mutually agreed terms which can be made through an internationally recognized certificate of compliance.

3.2.2 Option 2. Technical prior art: Disclosing the source of genetic resources and traditional knowledge in patent applications would assist patent examiners and judges in the establishment of prior art with regard to inventions that somehow relate to these resources or this knowledge, including use of databases of traditional knowledge that is prior art.

<sup>9</sup> Where one or more options are presented on any issue it is understood the possibility remains for there to be a **no** option on the issue

3.2.3 Option 3. Promoting transparency and dissemination of information by disclosing country of origin and publishing and disclosing technical information related to new inventions, where appropriate and where publicly available, so as to enrich the total body of technical knowledge accessible to the public.

### **3.3 Traceability**

Disclosing the source in patent applications would allow the providers of genetic resources and traditional knowledge to keep track of the use of their resources or knowledge in research and development resulting in patentable inventions.

### **3.4 Rights of traditional knowledge holders**

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

## **OBJECTIVE 4: Relationship between international, [regional] agreements, instruments and treaties**

4.1 Option 1. [Establish a] [Recognize] the coherent and mutually supportive [system] relationship between [intellectual property rights] [patents] involving the utilization of genetic resources, their [derivatives] and/or associated traditional knowledge and [existing] relevant international [and regional] [agreements and treaties] instruments, [including ensure consistency with international legal standards in the promotion and protection of the [collective] rights of indigenous peoples.]

4.2 Option 2. [Promote a mutually supportive relationship] [Promotion of cooperation] with relevant international agreements [and processes].

### **Guiding Principles Objective 4**

#### **4.3 Respect and Consistency.**

4.3.1 [Promote respect for [and seek consistency with] other relevant international [and regional] instruments [and processes].

4.3.2 The work of the IGC should not prejudice the work pursued in other fora.]

#### **4.4 Cooperation, Awareness and Information Sharing/Linkage CBD/ ITPGRFA.**

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

## **OBJECTIVE 5: Role of Intellectual Property System in promoting innovation and knowledge, technology transfer.**

5.1 Recognize [and maintain] [strengthen] the role of the [intellectual property] [patent] system in promoting innovation, transfer and dissemination of technology[, to the mutual advantage of stakeholders, providers, holders and users of genetic resources, their [derivatives]

and[/or] associated traditional knowledge [in a manner conducive to social, cultural and economic welfare wellbeing and development [while]:

(a) [contributing] ensuring to the protection of genetic resources, [their derivatives] and[/or] associated traditional knowledge.

(b) preventing the adverse effects of the [intellectual property] [patent] system on the [indigenous peoples] indigenous and local communities' [customs, beliefs and rights, traditional knowledge] laws, practices, knowledge systems and rights with the aim of recognizing and protecting the rights of [indigenous peoples] indigenous and local communities to use, develop, create and protect their knowledge and innovation in relation to genetic resources].

## Guiding Principles Objective 5

**5.2 Maintaining Incentive for Innovation** [Maintain the incentives for innovation provided by the intellectual property system.] [Recognize and maintain the role of the intellectual property system in promoting innovation, noting the relationship with genetic resources, [their derivatives] and/or associated traditional knowledge [and in the protection of traditional knowledge, genetic resources, [their derivatives] and/or associated traditional knowledge and traditional cultural expressions and fair and equitable sharing of benefits arising from their use.]

### **5.3 Legal Certainty**

[Promote] To [strengthen legal] certainty and [clarity] [scope] of intellectual property rights [, noting the relationship with genetic resources, [their derivatives] and/or associated traditional knowledge and obligations with respect to the protection of traditional knowledge [beneficiaries] [of indigenous peoples and local communities], genetic resources, [their derivatives] and/or associated traditional knowledge and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit-sharing].

### **5.4 Protect Creativity and Reward for Investment**

5.4.1 Option 1. To protect from national and international biopiracy, creativity, reward investments and ensure prior informed consent and fair and equitable benefit-sharing with the [indigenous peoples and local communities, [and] traditional knowledge [holders] [owners]] [traditional knowledge beneficiaries].

5.4.2 Option 2. Protect creativity and reward [public, private and community] investments [and ensure prior informed consent and fair and equitable benefit-sharing, mutually agreed terms] [made in developing a new invention [which has been developed in full compliance with national laws and requirements, including the principles of prior informed consent, fair and equitable benefit-sharing, mutually agreed terms]].

### **5.5 Transparency**

Promote transparency and dissemination of information [by disclosing country of origin of genetic resources] [, where not in contrast with public morality and/or order public,] [and providing sufficient protection] by:

- (a) [publishing and disclosing technical information related to new inventions, so as to enrich the total body of technical knowledge accessible to the public;
- (b) disclosing country of origin and publishing and disclosing technical information related to new inventions, [where appropriate and where publicly available], so as to enrich the total body of technical knowledge accessible to the public; and

- (c) increase legal certainty and trust between users and providers of genetic resources and traditional knowledge through a mandatory disclosure of origin or source.]

**[ARTICLE 1]**  
**[[SUBJECT MATTER OF PROTECTION]**  
**[OBJECTIVE]**

1.1 [[Protection] this instrument shall [extend] apply to any [utilization of] intellectual property right derived from genetic resources, [their derivatives] and associated traditional knowledge.]

**[ARTICLE 2]**  
**[[BENEFITS] / BENEFICIARIES [OF THE PROPOSALS]]**  
**[OBJECTIVES]**

**OPTION 1**

2.1 Measures related to the compliance with existing rules of access and benefit-sharing derived from the utilization [for the protection] of genetic resources,[ their derivatives] and associated traditional knowledge shall be for the benefit of country providing such resources and knowledge [of origin of genetic resources].

2.2 Parties shall respect the rights of indigenous and local communities in the traditional knowledge associated with genetic resources, [their derivatives] in accordance with the [domestic]/national legislation and existing international agreements and treaties, in particular the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity and ITPGRFA.

2.3 The beneficiaries of genetic resources and associated traditional knowledge under this instrument shall have the following exclusive rights that:

- (a) arise out of the existence of knowledge (de facto rights);
- (b) are inalienable and in perpetuity as long as knowledge exist;
- (c) are intergenerational, i.e., passed on to future generations; and
- (d) to authorize or deny access to the use of genetic resources and associated knowledge.

**OPTION 2**

2.4 A global and compulsory system creates a level playing field for industry and the commercial exploitation of 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.

**[ARTICLE 3]  
[SCOPE [OF [LEGAL] PROTECTION]]  
[[MANDATORY] DISCLOSURE REQUIREMENTS]**

**LEGAL PROTECTION**

3.1 [The [Contracting Parties] [Countries] shall provide legal protection to genetic resources and associated traditional knowledge as a unique knowledge system that has the following characteristics:

- (a) Traditional knowledge, genetic resources, landscapes, cultural and spiritual values and customary laws, are inextricably linked and together maintain the integrity of knowledge systems.
- (b) Genetic resources and biodiversity cannot be separated from traditional knowledge as intangible and tangible components cannot be separated.
- (c) Genetic resources and associated traditional knowledge is part of the collective, ancestral, territorial, spiritual, cultural and intellectual heritage.
- (d) Genetic resources and associated traditional knowledge is transmitted from generation to generation in diverse forms and is inalienable, indivisible and imprescriptible.

3.2 No registration of knowledge is required for rights to be legally recognized].

**DISCLOSURE PROTECTION**

**OPTION 1**

3.3 [Contracting Parties] [Countries] shall provide in [their national intellectual property] [patent] legislation a mandatory disclosure requirement. The disclosure requirement should be mandatory. This implies that it should be implemented in a legally binding and universal manner.

3.4 Check Point:

- (a) Option 1. [Contracting Parties] [Countries] shall appoint national intellectual property offices as a checkpoint for disclosure of the country of origin and source of genetic resources, [their derivatives] and associated traditional knowledge [and for their monitoring.]
- (b) Option 2. The patent system must provide for a mandatory disclosure requirement ensuring that the IP Offices becomes a key checkpoint for disclosure [and monitoring] of the utilization of genetic resources and/or associated TK (in line with Article 17 of the CBD Nagoya Protocol).

**OPTION 2**

3.5 [Contracting Parties] [Countries] may provide in their national patent legislation a mandatory disclosure requirement.

**OPTION 3**

3.6 Patent disclosure requirements shall not include a mandatory disclosure relating to genetic resources [, their derivatives and associated traditional knowledge] unless such disclosure is material to the patentability criteria of novelty, inventive step or enablement.

3.7 Patent applicants shall be under no requirement to disclose the source, origin or other information relating to genetic resources [unless such information is material to the patentability requirements of novelty, inventive step or enablement.

<b>Types of [intellectual property] [patent] right applications relevant to disclosure requirements/[Trigger points]</b>
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*Sub-option 1*

3.8 The invention must be directly based on the specific genetic resources. [in the claimed invention and] In such circumstances

- (a) The invention must make immediate use of the genetic resource, that is, depend on the specific properties of this resource;
- (b) The inventor must have had physical access to this resource, that is, its possession or at least contact which is sufficient enough to identify the properties of the genetic resource relevant for the invention; and [or]
- (c) [If the applicant is aware that the invention is directly based on traditional knowledge associated with genetic resources, that is, the inventor must consciously derive the invention from this knowledge].

*Sub-option 2*

3.9 The application involves genetic resources, [their derivatives] and associated traditional knowledge.

*Sub-Option 3*

3.10 A patent disclosure requirement related to genetic resources [their derivatives] and associated traditional knowledge shall not apply to the following:

- (a) all human genetic resources including human pathogens;
- (b) derivatives;
- (c) commodities;
- (d) traditional knowledge in the public domain;
- (e) genetic resources found outside of national jurisdictions; and
- (f) all genetic resources acquired before the national implementations of the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

*Sub-Option 4*

3.11 The disclosure requirement shall apply to invention that concerns or uses genetic resources and/or associated traditional knowledge. For genetic resources, the disclosure requirement shall apply even where the inventor has altered the structure of the received material.

## Content of the Disclosure

### *Sub-option 1*

3.12 Parties shall require applicants to disclose The country providing such resources and the source in the country providing the genetic resources and/or [their derivatives] and associated traditional knowledge.

3.13 Parties shall also require that applicants provide a copy of an internationally recognized certificate of compliance (IRCC). If an IRCC is not applicable in the providing country, the applicant should provide relevant information regarding compliance with prior informed consent and access and fair equitable benefit-sharing as required by the national legislation of the country providing the genetic resources and/or associated traditional knowledge, that is, the country of origin of such resources or a country that has acquired the genetic resources and/or associated traditional knowledge in accordance with the Convention on Biological Diversity.

### *Sub-option 2*

3.14 Mandatory disclosure of information in the patent application of the following:

- (a) The applicant should declare the country of origin, or if not known, the source of the specific genetic resource to which the inventor has had physical access and which is still known to him.
- (b) In the exceptional case that both the country of origin and the source are unknown to the applicant this should be declared accordingly.

### *Sub-option 3*

3.15 Patent applicants must declare the primary source to fulfill the requirement, if they have information about this primary source at hand, whereas a secondary source may only be declared if patent applicants have no information at hand about the primary source. In case the source is unknown this must be confirmed by the patent applicant.

### *Sub-option 4*

3.16 Country of origin and source of genetic resources, [their derivatives] and associated traditional knowledge.

3.17 Prior informed consent, either by the certificate of origin or by any other document issued in accordance with the domestic law of country of origin. In case the country of origin is not identifiable even after making reasonable efforts, certificate of evidence issued in accordance with the domestic law of country providing the genetic resources.

3.18. Evidence of benefit sharing under mutually agreed terms entered with the beneficiaries as define in Article 2 in accordance with their domestic legislation.

3.19 Written and oral information regarding traditional knowledge associated with genetic resources, [their derivatives] for enabling search and examination of the intellectual property application including the details of the holder of the TK.

### *Sub-Option 5*

3.20 Mandatory disclosure requirements shall be met by providing an internationally recognized certificate of compliance as described in Article 17.2 of the Nagoya Protocol on

Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

Sub-Option 6

3.21 The patent application shall include information on the country from which the inventor collected or received the genetic resources and/or associated traditional knowledge (the providing country). If it follows from the national law in the providing country that access to genetic resources or traditional knowledge shall be subject to prior consent, the application shall state whether such consent has been obtained.

3.22 If the providing country is not the same as the country of origin of the genetic resources and/or the associated traditional knowledge, the application shall also state the country of origin. For genetic resources, the country of origin means the country from which material was collected from its natural environment and, for associated traditional knowledge, the country in which the knowledge was developed. If the national law in the country of origin requires that access to genetic resources or associated traditional knowledge shall be subject to prior consent, the application shall state whether such consent has been obtained.

3.23 If the information set out in paragraphs 1 and 2 is not known to the applicant, the applicant shall state the immediate source from which the inventor collected or received the genetic resources and/or associated traditional knowledge.

3.24 If access to genetic resources has been provided in pursuance of Article 12.2 and Article 12.3 of the ITPGRFA, a copy of the standard material transfer agreement stipulated in Article 12.4 of the Treaty shall be enclosed with the patent application instead of the information stipulated in the first and second paragraphs. If the applicant has obtained an internationally recognized certificate of compliance as mentioned in Article 17.4 of the Nagoya Protocol on Access and Fair and Equitable Sharing of Benefits Arising from the Utilization of Genetic Resources to the Convention on Biological Diversity that covers the genetic resources the invention concerns or uses, a copy of the certificate shall be enclosed with the patent application instead of the information stipulated in the first and second paragraphs.

**Actions of the [intellectual property] [patent] office**

*Sub-option 1*

3.25 Put in place an adequate information dissemination system to enable an opportunity by relevant authorities from other [Contracting Parties] [Countries], indigenous and local communities or any other interested parties to submit information relevant to search and examination of an intellectual property application pending before national intellectual property offices in order to better assess compliance with the eligibility criteria for the grant of intellectual property rights.

3.26 That the intellectual property offices while examining the intellectual property application ascertain whether the applicant has comply with the mandatory disclosure requirements as per clause 1(a) of this Article and take necessary measures as mandated in this instrument in case of non compliance.

3.27 That the national [intellectual property] [patent] officers [shall] should not grant patents on life forms , or parts thereof, in the form of biological or genetic resources as they are found in nature, that are only isolated or characterized as such, as well as [their derivatives] and associated traditional knowledge.

*Sub-option 2*

3.28 Parties shall publish information disclosed jointly with the publication of the application or the grant of patent, whichever is made first.

**Relationship between PCT and PLT<sup>10</sup>**

*Sub-option 1*

3.29 Amend relevant provisions of the PCT and PLT. to include a mandatory disclosure *requirement* of the origin and source of the genetic resources.

*Sub-option 2*

3.30 Amend relevant provisions of the PCT and PLT, in particular Rules 4.17, *26ter* and *51bis*, to include a mandatory disclosure requirement of the origin and source of the genetic resources, [their derivatives] and associated traditional knowledge. The amendments shall also include requiring confirmation of prior informed consent, evidence of benefit sharing under mutually agreed terms with the country of origin.

*Sub-option 3*

3.31 Amend the PCT Regulations to explicitly enable the national patent legislation to require the declaration of the source of genetic resources and traditional knowledge in patent applications (proposals for specific wording are contained in document WIPO/GRTKF/IC/20/INF/10 Appendix 1). The proposals thus leave it up to the national legislator to decide whether such a requirement is to be introduced in the national patent legislation.

3.32 Based on the reference to the PCT contained in Article 6.1 of WIPO's Patent Law Treaty (PLT), the proposed amendment to the PCT would also apply to the PLT. Accordingly, the [Contracting Parties] [Countries] of the PLT would also explicitly be enabled to require in their national patent laws that the patent applicants declare the source of genetic resources and/or traditional knowledge in national patent applications.

*Sub-option 3*

3.33 Amend the PCT and PLT to reflect a mandatory disclosure requirement of the origin of the genetic resource, incorporation of the "internationally recognized certificate of compliance" as stipulated in the Nagoya Protocol and any other submission that may be tabled by member countries.

*Sub-option 4*

3.34 [Contracting Parties] [Countries] of the PCT shall take steps to amend the guidelines for search and examination procedures for patent applications to ensure that they take into account the disclosure of the origin of genetic resources, [their derivatives] and associated traditional knowledge. The provision is applicable to regional patent authorities as well as the international search and examination authorities under the PCT.

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<sup>10</sup> Where one or more options are presented on any issue it is understood the possibility remains for there to be a **no** option on the issue

## **DEFENSIVE PROTECTION**

### **Data Base Inventory**

3.35 [WIPO begin developing an inventory of databases with [requesting] the assistance of Member States and information resources on genetic resources and associated traditional knowledge but at the same time maintaining protection of indigenous sources where such cultural protocols exist to ensure the prior informed consent of the indigenous peoples and local communities.]

### **Information systems on GR for defensive protection**

#### **OPTION 1**

3.36 Develop a database related to genetic resources and to traditional knowledge accessible by examiners worldwide in order to avoid the erroneous granting of patents for genetic resources and related traditional knowledge.

3.37 A summary, which has been written in a language which every examiner can understand, be attached to documents written in indigenous languages.

3.38 Each country to assess and compile the information concerning genetic resources and the related traditional knowledge under its own responsibility.

3.39 An all-in-one consolidated system or multiple systems easily searchable with one click.

3.40 Searchable databases should be in the possession of, and maintained by, each participating WIPO member states. The database will be composed of a WIPO. portal site as well as databases of WIPO member states, which are linked to this portal site.

3.41 The WIPO portal site is only accessible to patent offices and other registered IP addresses.

#### **OPTION 2**

3.42 Collect genetic resources and associated traditional knowledge into databases.

3.43 There is a minimum standard to harmonize the structure and content of these databases.

3.44 WIPO administers a system to access the local, regional and national databases of genetic resources and associated traditional knowledge.

3.45 Establishment of an international gateway on traditional knowledge.

#### **OPTION 3**

3.46 Make available written and oral information regarding traditional knowledge associated with genetic resources, [their derivatives] for enabling search and examination of the [intellectual property] [patent] application including the details of the holder of the TK.

3.47 Put in place an adequate information dissemination system to enable an opportunity by relevant authorities from other [Contracting Parties] [Countries], indigenous and local communities or any other interested parties to submit information relevant to search and examination of an [intellectual property] [patent] application pending before national [intellectual

property] [patent] offices in order to better assess compliance with the eligibility criteria for the grant of intellectual property rights.

3.48 That the national intellectual property offices [shall] should consider all relevant written and oral [information] prior art relating to genetic resources, [their derivatives] and associated traditional knowledge which is available to them, regardless of the language, from all countries when conducting search and examination for determining the eligibility criteria for granting of [intellectual property] [patent] rights.

#### **OPTION 4**

3.49 Develop databases related to genetic resources, [their derivatives] and associated traditional knowledge accessible to relevant competent authorities and other parties [indigenous peoples and local communities] in order to [ensure the free prior informed consent] avoid the erroneous granting of patents for genetic resources and related traditional knowledge and ensure transparency, traceability and mutual trust taking into account access and benefit sharing arrangements as provided for under the CBD and the Nagoya Protocol.

3.50 Efforts should be made to codify the oral information related to genetic resources, [their derivatives] and associated traditional knowledge for the purpose of enhancing the development of databases.

#### **[Additional and Complementary Protection Measures/Guidelines or recommendations on defensive protection]**

#### **OPTION 1**

3.51 That the national [intellectual property] [patent] offices [shall] should develop appropriate and adequate guidelines for the purpose of conducting search and examination of [intellectual property] [patent] applications relating to genetic resource, [their derivatives] and associated traditional knowledge considering existing prior art accessible to the examiners, as appropriate [and additional information provided by the applicants, as well as accessible to the examiners].

#### **OPTION 2**

3.52 Recommendations or guidelines for search and examination procedures for patent applications to ensure that they better take into account the disclosure of the origin of genetic resources.

3.53 Use of available databases on genetic resources and/or associated traditional knowledge.

#### **Patents on life forms and naturally occurring genetic resources<sup>11</sup>**

3.54 Option 1. No intellectual property rights shall be granted to genetic resources that naturally occur in situ and ex situ.

3.55 Option 2. Enhance the availability of patent protection for life forms and new uses for known substances in order to create benefits and support benefit sharing from the use of genetic resources and associated traditional knowledge.

<sup>11</sup> Where one or more options are presented on any issue it is understood the possibility remains for there to be a **no** option on the issue.

3.56 Option 3. That the national [intellectual property] [patent] offices [shall] should not grant patents on life forms, or parts thereof, in the form of biological or genetic resources as they are found in nature, that are only isolated or characterized as such, as well as [their derivatives] and associated traditional knowledge.

**[ARTICLE 4]**  
**[PROPOSAL ON COMPLEMENTARY] [PROTECTION] MEASURES**

**OPTION 1**

4.1 [Contracting Parties] [countries] may facilitate access to information, including information made available in databases, relating to genetic resources, [their derivatives] and associated traditional knowledge with the intellectual property offices of [Contracting Parties] [countries] to this instrument.

4.2 [Contracting Parties] [countries] shall ensure that:

- (a) Confidentiality of such information provided to the intellectual property offices as stated in clause [1.1.] is maintained by the such offices and the applicants who have access to such information, in accordance with [domestic] international rights and law national legislation or contractual obligation [, except where the information is cited as prior art during the examination of a patent application].
- (b) Any violation of the same shall be considered as an act of unfair competition and a violation of contractual obligations or an infringement of the protection provided in this instrument and be subjected to sanction as provided in this instrument.]
- (c) They share information and best practices in tech transfer and contracts related to genetic resources through WIPO databases for such information and further develop guidelines for model contractual provisions.
- (d) They share information on intellectual property guidelines for access and equitable benefit-sharing and request WIPO to conduct a study on licensing practices on genetic resources.

**OPTION 2**

4.3 A simple notification procedure should be introduced to be followed by the patent offices every time they receive a declaration; it would be adequate to identify in particular the Clearing House Mechanism of the CBD/ITPGRFA as the central body to which the patent offices should send the available information.

**OPTION 3**

4.4 Establish a publicly available list of government agencies competent to receive information about patent applications containing a declaration of the source of genetic resources and/or traditional knowledge. Patent offices receiving patent applications containing such declaration could inform the competent government agency that the respective State is declared as the source. WIPO could, in close collaboration with the CBD/ITPGRFA, consider the possible establishment of such a list of competent government agencies.

**[ARTICLE 5]  
RELATIONSHIP WITH INTERNATIONAL AGREEMENTS**

5.1 [Contracting Parties] [Countries] shall establish a coherent system and promote mutually supportive relationship between intellectual property rights involving the utilization of genetic resources, [their derivatives] and associated traditional knowledge and existing international agreements and treaties.

5.2 [Contracting Parties] [Countries] shall support, in particular, the implementation of the Convention on Biological Diversity (including communication with its Clearing House) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity, the ITPGRFA and the TRIPS Agreement and, as the case may be, of regional agreements. PLT and PCT would need to be amended.

5.3 The disclosure of source requirement enables the [contracting Parties] [countries] of relevant international agreements, including the CBD/ITPGRFA, the PCT, the PLT and the TRIPS Agreement to fulfill their respective obligations.

**[ARTICLE 6]  
INTERNATIONAL COOPERATION**

6.1 [Relevant WIPO bodies to encourage Patent Cooperation Treaty members to develop a set of guidelines for the [search and examination] administrative disclosure of origin or source by the international search and examination authorities under Patent Cooperation Treaty including additional information arising from the disclosure requirement as provided in this instrument.]

**[ARTICLE 7]  
TRANSBOUNDARY COOPERATION**

7.1 [In instances where genetic resources and associated traditional knowledge associated with genetic resources [of indigenous peoples and local communities] is located in territories of different [Contracting Parties] [countries], those [[Contracting Parties] [Countries]] countries [shall] should co-operate by taking measures that are supportive of and do not run counter to the objectives of this instrument.]

**[ARTICLE 8]  
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS**

**OPTION 1**

8.1 Sanctions that go to the status of a granted patent right
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*Sub-Option 1*

8.2 Patents granted without disclosing country of origin or source shall be subject to issuing of mandatory licenses, as foreseen in Article 31 of the TRIPS Agreement.

*Sub-Option 2*

8.3 Countries which revoke patents for failure to disclose the source of origin of a genetic resource or failure to comply with ABS laws shall pay adequate remuneration to both the country of origin and the patent holder.

*Sub-Option 3*

8.4 Any patent relating to genetic resources or traditional knowledge, the commercialization of which is subject to regulatory review, shall be entitled to extension of the term of the patent to compensate for delays caused by such regulatory review. Such patent term restoration shall be made available for a period that corresponds to the period of delay in commercialization caused by the regulatory review.

*Sub-Option 4*

8.5 Any patent relating to genetic resources or traditional knowledge whose grant is unduly delayed by the imposition of a mandatory disclosure requirement relating to the same shall be entitled to an extension of the patent term. Such patent term extension, corresponds to any period of delay in patent grant caused by the imposition of such mandatory disclosure requirements.

*Sub-Option 5*

8.6 [Contracting parties] [Countries] shall ensure, in accordance with their legal systems, adequate criminal, civil and administrative enforcement procedures and dispute resolution mechanisms are available under their laws against the willful infringement of the protection provided to genetic resources, [their derivatives] and associated traditional knowledge under this instrument.

8.7 [Contracting Parties] [Countries] shall provide that administrative and/or judicial authorities have the right to:

- (a) Revoke intellectual property rights; and
- (b) Render unenforceable intellectual property rights when the applicant has either failed to comply with the obligations of mandatory disclosure requirements as provided in this instrument or provided false or fraudulent information.

8.8 Where a dispute arises in relation to mutually agreed terms between users, beneficiaries and providers of genetic resources, [their derivatives] and associated with genetic resources each Party may be entitled to refer the issue to an alternative dispute resolution mechanism recognized by domestic legislation.

*Sub-Option 6*

8.9 Countries may take other measures and sanctions, including revocation, against the violation of the mandatory disclosure requirements.

*Sub-Option 7*

8.10 Administration and/or judicial authorities shall have the right to revoke, subject to Article 32 of the TRIPS Agreement, or render unenforceable a patent.

*Sub-Option 8*

8.11 If it is discovered after the granting of a patent that the applicant failed to declare the source or submitted false information, such failure to comply with the requirement may only be a

ground for revocation or invalidation of the granted patent in the case of fraudulent intention (Article 10 PLT).

## OPTION 2

8.12 Sanctions of an administrative character or that are outside the [intellectual property] [patent] system.
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### *Sub-option 1*

8.13 The patent system should provide certainty of rights for users of genetic resources and traditional knowledge and shall not impose requirements that detract from legal certainty.

### *Sub-option 2*

8.14 [Contracting parties] [Countries] shall ensure, in accordance with their legal systems, adequate criminal, civil and administrative enforcement procedures and dispute resolution mechanisms are available under their laws against the willful infringement of the protection provided to genetic resources, [their derivatives] and associated traditional knowledge under this instrument.

8.15 [Contracting Parties] [Countries] shall provide that administrative and/or judicial authorities have the right to:

- (a) Prevent the further processing of the intellectual property applications.
- (b) Prevent the granting of intellectual property rights.

### *Sub-option 3*

8.16 Patent applications shall not be processed without completion of such requirements.

### *Sub-option 4*

8.17 Countries shall impose sanctions, which shall include administrative sanctions, criminal sanctions, fines and adequate compensation for damages.

### *Sub-option 5*

8.18 Where it is proved that the patent applicant has disclosed incorrect or incomplete information, effective, proportionate and dissuasive sanctions outside the field of patent law should be imposed on the patent applicant or holder. If the applicant provides supplementary information during the processing of the application, the submission of this supplementary information should not affect the further processing of the application. For reasons of legal certainty, the submission of incorrect or incomplete information should not have any effect on the validity of the granted patent or on its enforceability against patent infringers.

8.19 It must be left to the individual [Contracting State] country to determine the character and the level of these sanctions, in accordance with domestic legal practices and respecting general principles of law. Both within WIPO as in other international fora means could be discussed to develop such sanctions.

### *Sub-option 7*

8.20 Administration and/or judicial authorities shall have the right to prevent (a) the further processing of an application or (b) the granting of a patent

*Sub-option 8*

8.21 [Contracting Parties] [Countries] shall, in accordance with their national legal systems, provide for adequate measures for the refusal of patent applications on the grounds of non-compliance and willful infringement of the protection of genetic resources, [their derivatives] and associated traditional knowledge, in pursuance of the applicable provisions of these regulations.

*Sub-option 9*

8.22 If the national law applicable by the designated office requires the declaration of the source of genetic resources or traditional knowledge, the proposed amended Rule 51*bis*.3(a) of the PCT regulations requires the designated office to invite the applicant, at the beginning of the national phase, to comply with this requirement within a time limit which shall not be less than two months from the date of the invitation. [Appendix I of 20/INF/10.]

8.23 If the patent applicant does not comply with this invitation within the set time limit, the designated Office may refuse the application or consider it withdrawn on the grounds of this non-compliance.

8.24 Furthermore, if it is discovered after the granting of a patent that the applicant failed to declare the source or submitted false information, such failure to comply with the requirement may not be a ground for revocation or invalidation of the granted patent. However, other sanctions provided for in national law, including criminal sanctions such as fines, may be imposed.

*Sub-option 10*

8.25 There shall be no sanction within the patent system for failure to meet any mandatory disclosure requirement relating to genetic resources or traditional knowledge nor shall failure to meet such requirements cause delay in processing or grant of the patent.

**OPTION 3**

8.26 If it is discovered after the grant of a patent that the applicant failed to disclose the information required or submitted false and fraudulent information, or it is demonstrated by the evidence that the access and utilization of genetic resources and/or associated traditional knowledge violated the relevant national legislation of the country providing genetic resources and/or associated traditional knowledge, that is, the country of origin of such resources or a country that has acquired the genetic resources and/or associated traditional knowledge in accordance with the CBD/ITPGRFA, [parties] Countries shall impose sanctions, which shall include administrative sanctions, criminal sanctions, fines and adequate compensation for damages. [Parties] Countries may take other measures and sanctions, including revocation, against the violation of the mandatory disclosure requirements.

**[ARTICLE 9]  
[TECHNICAL ASSISTANCE, COOPERATION AND CAPACITY BUILDING]**

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

[Annex B follows]

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

## Introduction

This text represents the results at the conclusion of the IGC's 21<sup>st</sup> session, in accordance with the mandate of the WIPO General Assemblies (contained in WO/GA/40/7). It represents a work in progress.

## Facilitators' Notes

The method used by facilitators was to merge options where possible, and explicitly identify elements of convergence (labeled "Facilitators' Option (Convergent Text)") and divergence (labeled "Optional Additions to the Facilitators' Text"). These elements of divergence can be considered to be the main policy issues.

New language added by delegations in the last iteration of the document is underlined; the fact that any new language is not square-bracketed does not necessarily indicate that it represents an element of convergence.

Square brackets that were present in WIPO/GRTKF/IC/21/4 were not removed.

Series of terms separated by slashes (for example, [holders]/[owners]) indicate that either of those terms is supported generally by at least one delegation and/or that the choice of terms is a matter of terminology, or depends on the type of instrument or on outstanding policy issues being resolved.

## POLICY OBJECTIVES

*The protection of traditional knowledge should aim to:*

### *Recognize value*

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

### *Promote respect*

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

### *Meet the [actual] rights and needs of holders of traditional knowledge*

*(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge [holders]/[owners], respect their rights as [holders]/[owners] and custodians of traditional knowledge under national and international law, contribute to their welfare and economic, cultural and social benefit and [reward] recognize the value of the contribution made by them to their communities and to the progress of science and socially beneficial technology, taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration;*

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

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

### *Empower [holders]/[owners] of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems*

*(v) be undertaken in a manner that empowers traditional knowledge [holders]/[owners] to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misuse and misappropriation, and should effectively empower associated*

*traditional knowledge [holders]/[owners] to exercise due rights and authority over their own knowledge;*

*Support traditional knowledge systems*

*(vi) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge [holders]/[owners]; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;*

*Contribute to safeguarding traditional knowledge*

*(vii) while [recognizing the value of a vibrant public domain], contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary and community practices, norms, laws and understandings of traditional knowledge [holders]/[owners], for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general on the basis of prior informed consent and the mutually agreed terms with the [holders]/[owners] of that knowledge;*

*[Repress] Prevent [unfair and inequitable uses] misappropriation and misuse*

*(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;*

*Respect for and cooperation with relevant international agreements and processes*

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

*Promote innovation and creativity*

*(x) encourage, reward and protect tradition based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous peoples and [traditional] local communities, including, subject to the consent of the traditional knowledge [holders]/[owners], by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;*

*Alternative*

*(x) [safeguard and promote innovation, creativity and the progress of science, and promote the transfer of technology on mutually agreed terms;]*

[End of alternative]

*Ensure prior informed consent and exchanges based on mutually agreed terms*

(xi) ensure the [use] safeguarding of traditional knowledge on the basis of customary laws, protocols and community procedures [with] through prior informed consent and exchanges based on mutually agreed terms, in [coordination] line with existing international and national regimes governing access to genetic resources in a fair and equitable manner;

[Promote mandatory disclosure requirement

(xi bis) ensure mandatory disclosure requirement of the country of origin of traditional knowledge and associated genetic resources that are related or used in the patent application]

*Promote equitable benefit sharing*

(xii) [promote] guarantee the fair and equitable sharing and distribution of monetary and non monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent [and including through [fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed] the establishment of mutually agreed conditions];

*Promote community development and legitimate trading activities*

(xiii) [if so desired] where requested by the [holders]/[owners] of traditional knowledge, promote the use of traditional knowledge for community based development, recognizing the rights of [traditional] indigenous peoples and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge [holders]/[owners] and custodians seek such development and opportunities consistent with their right to freely pursue economic development;

*Preclude the grant of [improper] IP rights to unauthorized parties*

(xiv) [curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring [the creation of digital libraries of publicly known traditional knowledge and associated genetic resources], [in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit sharing conditions have been complied with in the country of origin];

*Alternative*

(xiv) [[curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring each [Member States]/[Contracting Parties] [could]/[to] consider, with the prior informed consent of its indigenous peoples and local communities, the creation of digital libraries of publicly-known traditional knowledge and associated genetic resources];

[End of alternative]

*Enhance transparency and mutual confidence*

(xv) *enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge [holders]/[owners] on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct [and the principles of free and prior informed consent];*

*Complement protection of traditional cultural expressions*

(xvi) *operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their [holistic identity].]*

*[Utilization of traditional knowledge by third parties*

(xvii) *enable the utilization of traditional knowledge by third parties:]*

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

(xviii) *promote access to knowledge and safeguard the public domain.]*

*Alternative*

(i) *recognize the [holistic] [distinctive] nature of traditional knowledge, including its social, spiritual, economic, intellectual, educational and cultural importance;*

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

(iii) *meet the actual needs of [holders]/[owners] and users of traditional knowledge taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration;*

(iv) *promote and support conservation, application and preservation of traditional knowledge;*

(v) *support traditional knowledge systems;*

*Alternative ((iv) + (v))*

*Promote the conservation of traditional knowledge*

*promote the conservation and the preservation of traditional knowledge and support traditional knowledge systems;*

[End of alternative]

(vi) *[repress] prevent [unfair and inequitable uses] illicit appropriation of traditional knowledge;*

*(vii) operate consistently with relevant international agreements and instruments [and processes];*

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

*Alternative ((vi) + (viii))*

*Promote community development*

*Promote community development through the supporting of traditional knowledge systems and the prevention of misappropriation;*

[End of alternative]

*(ix) enhance transparency and mutual confidence in relations between traditional knowledge [holders]/[owners] on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct [and the principles of free and prior informed consent].*

[End of alternative]

## GENERAL GUIDING PRINCIPLES

*These principles should be respected to ensure that the specific substantive provisions concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection:*

*(a) Principle of responsiveness and assistance to the [needs and expectations of] rights and needs regarding the protection of traditional knowledge identified by traditional knowledge [holders]/[owners]*

*(b) Principle of recognition of rights regarding the protection of traditional knowledge of indigenous peoples as enunciated within the United Nations Declaration on the Rights of Indigenous Peoples and ILO 169*

### *Alternative*

*(b) Principle of recognition of the interests of traditional knowledge [holders]/[owners]*

[End of alternative]

*(c) Principle of effectiveness and accessibility of protection*

*(d) Principle of flexibility and comprehensiveness*

*(e) Principle of equity and benefit sharing*

### *Alternative*

*(e) Principle of mandatory disclosure of country of origin and equity, including benefit sharing*

[End of alternative]

*(f) [Principle of consistency with existing legal systems governing access to traditional knowledge and associated genetic resources]*

*(g) [Principle of respect for and cooperation with] Principle of cooperative interface [other] among international and [regional instruments and] negotiation processes*

### *Alternative ((f) + (g))*

*Principle of consistency with, respect for and cooperation between existing international and regional instruments, legal systems and negotiation processes regarding access to traditional knowledge and associated genetic resources.*

[End of alternative]

### *Alternative*

*(g) Principle of compatibility or consistency, respect for other instruments and international processes as well as regional and cooperation processes including those processes governing genetic resource.*

[End of alternative]

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

Alternative

(h) *Principle of recognition of respect for indigenous knowledge, cultures and traditional practices and the contributions to sustainable development and proper management of the environment*

[End of alternative]

Alternative

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

[End of alternative]

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

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

Alternative ((a) + (j))

*Principle of responsiveness [and assistance] to the [needs and] interests of traditional knowledge [holders]/[owners] and those who make use of traditional knowledge*

[End of alternative]

(k) *[Principle of recognizing that knowledge that is in the public domain is the common heritage of mankind]*

(l) *[Principle of protecting, preserving and expanding the public domain]*

(m) *Principle of the necessity for new incentives to share knowledge and to minimize restrictions on access*

(n) *Principle that any monopoly on the right to use certain information should be for a limited time*

(o) *Principle of protecting and supporting the interests of creators*

## ARTICLE 1

### SUBJECT MATTER OF PROTECTION

#### DEFINITION OF TRADITIONAL KNOWLEDGE

##### *Facilitators' Option (Convergent Text)*

1.1 For the purposes of this instrument, "traditional knowledge" [refers to] includes know-how, skills, innovations, practices, teachings and learnings [developed within a traditional context]/[developed with an indigenous people or local community]/[and that is intergenerational]/[and that is passed on from generation to generation].

##### *Optional Additions to the Facilitators' Text*

- (a) [is knowledge that is dynamic and evolving and]
- (b) [resulting from intellectual activity]
- (c) [and which may be associated with agricultural, environmental, healthcare and medical knowledge, biodiversity, traditional lifestyles and natural and genetic resources, and know-how of traditional architecture and construction technologies]
- (d) [and which may subsist in codified, oral or other forms]
- (e) [traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material heritage of [indigenous peoples and local communities] beneficiaries as defined in Article 2.]
- (f) [and are inalienable, indivisible and imprescriptible.]

##### *Alternative*

For the purposes of this instrument, traditional knowledge includes [collectively] generated and preserved from generation to generation or intergenerational know-how, skills, innovations, practices, teachings. [They exist or develop inter alia by indigenous or local communities.]

## CRITERIA FOR ELIGIBILITY

### *Facilitators' Option (Convergent Text)*

1.2 Protection extends to traditional knowledge that is associated with beneficiaries as defined in Article 2, [collectively] generated, shared/transmitted and preserved [and [integral]/[closely linked]] to the cultural identity of beneficiaries as defined in Article 2.

### *Optional Additions to the Facilitators' Text*

- (a) [the unique product of or is distinctively] associated to the beneficiaries or
- (b) [integral]/[linked] identified/associated with [to] the cultural identity of beneficiaries
- (c) [not widely known or used outside the community of the beneficiaries as defined in Article 2, [for a reasonable period of time]]
- (d) [not in the public domain]
- (e) [not protected by an intellectual property right]
- (f) [not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known]
- (g) *whether the list should be cumulative or not (and therefore whether to include the term "and" or "or" after the next-to-last item in any list comprising any combination of (a) to (f) above)*
- (h) *whether the provision should include a reference to "generation-to-generation"/"intergenerational"*

## ARTICLE 2

### BENEFICIARIES OF PROTECTION

#### *Facilitators' Option (Convergent Text)*

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

#### *Optional Additions to the Facilitators' Text*

- (a) [traditional communities]
- (b) [families]
- (c) [nations]
- (d) [individuals within the categories listed above]
- (e) [and, where traditional knowledge is not specifically attributable or confined to an indigenous people or local community, or it is not possible to identify the community that generated it, any national entity that may be determined by national law]/[and/or any national entity that may be determined by national law]
- (f) [who develop, use, hold and maintain traditional knowledge]
- (g) even when traditional knowledge is held by [individuals] within the categories.

#### *Alternative*

Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples and communities and local communities and similar categories as defined by national law

ARTICLE 3  
SCOPE OF PROTECTION

*Option 1*

3.1 [[Member States]/[Contracting Parties] should provide] adequate and effective legal, policy or administrative measures [should be provided], as appropriate and in accordance with national law, to:

- (a) prevent the unauthorized disclosure, use or other exploitation of [secret] [protected] traditional knowledge;
- (b) where [protected] traditional knowledge is knowingly used outside the traditional context:
  - (i) acknowledge the source of traditional knowledge and attribute its holders/owners where known unless they decide otherwise;
  - (ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders/owners;
  - (iii) [encourage]/[ensure, where the traditional knowledge] [is secret]/[is not widely known] traditional knowledge holders and users to establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits [arising from the commercial use of that traditional knowledge] in compliance with the right of local communities to decide to grant access to that knowledge or not.

*Option 2*

3.1 Beneficiaries, as defined in Article 2, [should]/[shall], [according to national law], have the following [exclusive] [collective] rights:

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

(g) [require [in the application for intellectual property rights involving the use of their traditional knowledge] the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.]

3.2 For the purposes of this instrument, the term “utilization” in relation to traditional knowledge [should]/[shall] refer to any of the following acts:

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

## ARTICLE 3 BIS

### SCOPE OF PROTECTION AND SANCTIONS

3 BIS.1 Access to and use of traditional knowledge requires prior informed consent from the indigenous people or local community that is the beneficiary of protection according to Article 2. The use of such knowledge [should]/[shall] be in accordance with the terms the beneficiary may have set out as a condition for the consent. Such terms can, *inter alia*, determine that benefits arising from the use of the knowledge [should]/[shall] be shared with the beneficiary.

3 BIS.2 In addition to the protection provided for in paragraph 1, users of traditional knowledge which fulfills the criterion in Article 1, Subparagraph 2(a) [should]/[shall]:

- (a) acknowledge the source of traditional knowledge and attribute the beneficiary, unless the beneficiary decides otherwise; and
- (b) use the knowledge in a manner that respects the cultures and practices of the beneficiary.

3 BIS.3 When traditional knowledge is accessed or used in a manner that contravenes any of the provisions in paragraphs 1 and 2, the beneficiary [should]/[shall] have the right to:

- (a) request that the judicial authorities order the infringer to desist from further infringements; and
- (b) a fair compensation from an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

3 BIS.4 The Parties [should]/[shall] provide adequate and effective legal measures to ensure the application and enforcement of the provisions set out in paragraphs 1 to 3.

3 BIS.5 Protection of traditional knowledge under this instrument [should]/[shall] not affect:

- (a) access to or use of knowledge which is invented independently of traditional knowledge of indigenous peoples or local communities or is discovered from other sources than an indigenous people or local community; and
- (b) generation, sharing, preservation and transmission and customary use of traditional knowledge by the beneficiaries in the traditional and customary context.

## ARTICLE 4

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

4.1 [Member States]/[Contracting Parties] [should]/[shall] [endeavor to]/[undertake to] adopt [[as appropriate and] in accordance with national law], the appropriate legal policy and/or administrative measures necessary to ensure the application of this instrument.

*Optional addition*

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

*Optional addition*

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

*Optional addition*

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

*Optional addition*

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

*Alternative*

[Member States]/[Contracting Parties] [should]/[shall]:

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

[End of alternative]

ARTICLE 4 BIS

DISCLOSURE REQUIREMENT

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

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

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

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

*Alternative*

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

[End of alternative]

## ARTICLE 5

### ADMINISTRATION [OF RIGHTS]

5.1 [Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] an appropriate national or regional competent authority (or authorities) [with the free, prior and informed consent of] [in consultation with] [traditional knowledge [holders]/[owners]], in accordance with their national law [and without prejudice to the right of traditional knowledge [holders]/[owners] to administer their rights according to their customary protocols, understandings, laws and practices]. The functions of any such authority may include, but need not be limited to, the following [, where so requested by the [holders]/[owners]] [, to the extent authorized by the [holders]/[owners]]:

- (a) disseminating information and promoting practices about traditional knowledge and its protection;
- (b) [ascertaining whether free, prior informed consent has been obtained];
- (c) providing advice to traditional knowledge [holders]/[owners] and users on the establishment of mutually agreed terms;
- (d) [applying the rules and procedures of the national legislation regarding prior and informed consent];
- [(e) applying the rules and procedures of the national legislation regarding [and supervising] the fair and equitable sharing of benefits; and]
- (f) assisting, where possible and appropriate, the [holders]/[owners] of traditional knowledge in the use, [practice]/[exercise] and enforcement of their rights over their traditional knowledge;
- (g) [determining whether an act pertaining to traditional knowledge constitutes an infringement or another act of unfair competition in relation to that knowledge].

#### *Alternative*

- 5.1 (a) Researchers and others [should]/[shall] seek the prior informed consent of communities holding traditional knowledge, in accordance with customary laws of the concerned community, before obtaining protected traditional knowledge.
- (b) The rights and responsibilities flowing from access to protected traditional knowledge [should]/[shall] be agreed upon by the parties. The terms for the rights and responsibilities may include providing for the equitable sharing of benefits arising from any agreed use of the protected knowledge, the provision of benefits in exchange for access, even without benefits being derived from use of the traditional knowledge or other arrangements as agreed.
- (c) Measures and mechanisms for obtaining prior informed consent and mutually agreed terms [should]/[shall] be understandable, appropriate and not burdensome for all relevant stakeholders, in particular for protected traditional knowledge holders; and [should]/[shall] ensure clarity and legal certainty.

(d) To assist transparency and compliance, [Member States]/[Contracting Parties] may establish a database to collect information on parties involved in agreements providing for mutually agreed terms as under Article 3. This information may be supplied by any of the parties involved in the agreement.

[End of alternative]

5.2 [Where traditional knowledge fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation and approval of the traditional knowledge [holders]/[owners] where possible, administer the rights of that traditional knowledge, in accordance with national law.]

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

5.4 [The established authority shall include authorities originating from indigenous peoples so that they form part of that authority.]

ARTICLE 5 BIS

APPLICATION OF COLLECTIVE RIGHTS

5 BIS.1 [Member States]/[Contracting Parties] [should]/[shall] establish, in consultation with the [holders]/[owners] of the traditional knowledge, and with their free prior informed consent, a national authority or authorities with the following functions:

- (a) adopt appropriate measures to guarantee the safeguarding of traditional knowledge;
- (b) disseminate information and promote practices, studies and research for the conservation of traditional knowledge when it is required by their [holders]/[owners];
- (c) give assistance to the [holders]/[owners] on the exercise of their rights and obligations in case of disputes with users;
- (d) inform the public regarding the threats facing traditional knowledge;
- (e) verify whether the users have obtained the free prior informed consent; and
- (f) supervise the fair and equitable sharing of benefits derived from the utilization of traditional knowledge.

5 BIS.2 The nature of the national or regional authority or authorities, created with the participation of indigenous peoples, [should]/[shall] be communicated to the Secretariat of the World Intellectual Property Organization.]

## ARTICLE 6

### EXCEPTIONS AND LIMITATIONS

6.1 Member States understand that [m]easures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context, [in accordance with national law].

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

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

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

#### *Alternative*

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

(b) does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.

#### *Alternative*

6.3 Contracting Parties may adopt appropriate limitations or exceptions under national law for the following purposes:

(a) teaching, learning, but does not include research resulting in profit-making or commercial purposes;

(b) for preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes.

6.4 Contracting Parties may permit the use of traditional knowledge for epidemics and natural disaster response, provided that the beneficiaries are adequately compensated.

[End of alternative]

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

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

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

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

6.6 [There shall be no right to [exclude others] from using knowledge that:

*Alternative*

6.6 The provisions of Article 3 shall not apply to any use of knowledge that:

[End of alternative]

(a) has been independently created;

(b) derived from sources other than the beneficiary; or

(c) is known outside of the beneficiaries' community.]

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

(a) obtained from a printed publication;

(b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent; or

(c) mutually agreed terms for access and benefit sharing apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.]

6.8 [Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible for this parties under the national law for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.]

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

6.10 [National authorities may exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.]

6.11 [National authorities, in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, authorize the use of protected traditional knowledge, without the consent of the protected traditional knowledge holder.]

ARTICLE 7  
TERM OF PROTECTION

*Option 1*

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

*Optional additions to Option 1*

- (a) traditional knowledge is transmitted from generation to generation and thus is imprescriptible
- (b) the protection [should]/[shall] applied and last for the life of indigenous peoples and local communities
- (c) the protection [should]/[shall] remain while the immaterial cultural heritage is not accessible to the public domain
- (d) the protection of secret, spiritual and sacred traditional knowledge [should]/[shall] last forever
- (e) the protection against biopiracy or any other infringement carried out with the intention of destroying wholly or partially the memory, the history and the image of indigenous peoples and communities

*Option 2*

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

ARTICLE 8  
FORMALITIES

*Option 1*

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

*Option 2*

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

[8.2 In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may [should]/[shall] maintain registers or other records of traditional knowledge.]

*Alternative*

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

## ARTICLE 9

### TRANSITIONAL MEASURES

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

#### *Optional addition*

9.2 [Member States]/[Contracting Parties] should ensure the necessary measures to secure the rights [acknowledged by national law] already acquired by third parties in accordance with its national law and its international legal obligations.

#### *Alternative*

9.2 Continuing acts in respect of traditional knowledge that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by these provisions, should be brought into conformity with these provisions within a reasonable period of time after they entry into force [, subject to respect for rights previously acquired by third parties in good faith].]

#### *Alternative*

[Notwithstanding paragraph 1, anyone who, before the date of entry into force of this instrument, has commenced to utilize traditional knowledge which was legally accessed, may continue a corresponding utilization of the traditional knowledge. Such right of utilization shall also, on similar conditions, be enjoyed by anyone who has made substantial preparations to utilize the traditional knowledge. The provision in this paragraph gives no right to utilize traditional knowledge in a way that contravenes the terms the beneficiary may have set out as a condition for access.]

## ARTICLE 10

### CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

[Protection under this instrument [should]/[shall] [take account of, and operate consistently with, other international [and regional and national] instruments [and processes]]/[leave intact] and in no way affect the rights or the protection provided for in international legal instruments [, in particular intellectual property instruments] [, in particular the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* to the *Convention on Biological Diversity*].]

#### *Optional additions*

- (a) In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future.
- (b) The provisions under this instrument should in no way diminish the protection measures that have already been granted under the auspices of other instruments or treaties.
- (c) These provisions should be applied in accordance to the respect of the cultural heritage of mankind as understood by UNESCO 2003 Convention of the protection of cultural and artistic expressions.
- (d) They should be fully in line with the FAO's 2001 Treaty on resources and they should/shall be in line with the provisions of the UN Declaration on the rights of Indigenous Peoples adopted in 2007.
- (e) Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples or local communities [or nations] / beneficiaries have now or may acquire in the future.

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

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

*Alternative*

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

[End of alternative]

*Alternative*

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

[End of alternative]

## ARTICLE 12

### TRANS-BOUNDARY COOPERATION

#### *Facilitators' Option (Convergent Text)*

In instances where traditional knowledge is located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] cooperate in addressing instances of transboundary traditional knowledge/by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation [should]/[shall] be done with the participation [and [prior informed] consent] of the traditional knowledge [holders]/[owners].

#### *Option 1*

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

[Member States]/[Contracting Parties] [should]/[shall] consider cooperating in the creation of such databases, especially where traditional knowledge is not uniquely held within the boundaries of a [Member States]/[Contracting Parties]. If protected traditional knowledge pursuant to article 1.2 is included in a database, the protected traditional knowledge should only be made available to others with the prior informed consent of the traditional knowledge holder.

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

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

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

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

#### *Optional addition to either option*

[Member States]/[Contracting Parties] consider the need for modalities of a global mutual benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of traditional knowledge that occurs in transboundary situations for which it is not possible to grant or obtain prior informed consent.

[Annex follows]

## Annex

### The Facilitators' Notes and Comments

#### Notes

- Facilitators have systematically replaced iterations of “should” or “shall” with “[should]/[shall]”; “Member State” or “Contracting Party” with “[Member State]/[Contracting Party]”; and “holders” or “owners” with “[holders]/[owners]” to indicate that the issues behind those terms are still outstanding.
- The facilitators suggest that the Plenary consider how to address these and other drafting issues ([may]/[should]/[shall], [intend]/[undertake]/[endeavor], [Member States]/[Contracting Parties], [holders]/[owners]), and the use of the active voice as opposed to the passive voice.

#### Additional Observations

- Some delegations made proposals for new definitions. Facilitators propose that the Plenary consider whether and how to include those.
- A number of delegations made proposals for new objectives but without providing language for these beyond the title. Facilitators invite delegations that have made such proposals to provide language for those proposals.

## COMMENTS BY THE FACILITATORS ON ARTICLE 1

### DEFINITION OF TRADITIONAL KNOWLEDGE

- The facilitators believe that the phrase “are inalienable, indivisible and imprescriptible”, which was also proposed by the Delegation of Bolivia under Article 7, represents a substantive provision, which should therefore not be part of a definition but rather, perhaps, of the scope of the protection.
- The facilitators believe that certain phrases, such as
  - Traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material heritage of indigenous peoples and local communities.
  - and which may subsist in codified, oral or other forms, and
  - and which may be associated with agricultural, environmental, healthcare and medical knowledge, biodiversity, traditional lifestyles and natural and genetic resources, and know-how of traditional architecture and construction technologies

are descriptive or aspirational, and could therefore be better suited for any preambular language than for a definition of traditional knowledge.

- In the traditional cultural expressions text, both options for an article on the subject matter of protection contain clauses that note that the specific choice of terms to denote the subject matter of protection should be determined “at the national, regional or sub-regional levels” or “by national legislation”. The facilitators suggest that the Plenary consider whether a similar clause would be appropriate for the traditional knowledge text, and whether it could simplify that text.

### CRITERIA FOR ELIGIBILITY

- Regarding 1.2(b) (“[integral]/[linked] to the cultural identity of beneficiaries”), the facilitators note that the equivalent provisions in the text on traditional cultural expressions (currently found in WO/GA/40/7 as Option 1, paragraph 2(c) and Option 2, Article 2) both refer to the “cultural or social identity” of the beneficiaries, and not strictly the “cultural identity”. The facilitators suggest that the Plenary assess whether the terminology used in the traditional knowledge text should match that used in the traditional cultural expressions text.

COMMENTS BY THE FACILITATORS ON ARTICLE 2

- Facilitators propose that the Plenary consider whether terms like “traditional communities” and “families” could be considered to be included as part of “local communities”.

## COMMENTS BY THE FACILITATORS ON ARTICLE 3

### *Elements of convergence*

- (i) concept of mechanisms to agree on use and/or access to traditional knowledge
- (ii) concept of acknowledgment of the source
- (iii) concept of respect for the cultural norms of the holders/owners
- (iv) provisions regarding mutually agreed terms
- (v) provisions regarding the sharing of benefits

### *Elements of divergence*

- (i) measures-based approach (Option 1) versus rights-based approach (Option 2)
- (ii) concept of “use outside of the traditional context” as a trigger for provisions on acknowledgment of source, cultural norms, mutually agreed terms and the sharing of benefits (in Option 1 only)
- (iii) provisions regarding mandatory disclosure (in Option 2 only)
- (iv) provisions regarding prior informed concept (in Option 2 only)
- (v) whether or not benefit sharing should apply only to commercial use (in Option 2 only)

### *Other observations*

- The Delegation of Morocco suggested the inclusion of a definition of “illicit appropriation”; however, that term is not currently used in the text. The Delegation of Morocco also submitted a definition of “utilization”, but this was already part of the text.
- Facilitators note that the terms “use” and “utilization” appear to be used interchangeably, and suggest that the Plenary clarify this matter.

## COMMENTS BY THE FACILITATORS ON ARTICLE 4

### *Elements of convergence*

[Member States]/[Contracting Parties] [should]/[shall] [endeavor to/undertake to] adopt [as appropriate and] in accordance with national law], the appropriate legal policy and/or administrative measures necessary to ensure the application of this instrument.

### *Elements of divergence*

- (i) suitability of enforcement procedures
- (ii) concept of alternative dispute settlement mechanisms

### *Other observations*

- The facilitators note that there is convergence on the suitability of Member States/ Contracting Parties adopting the measures necessary to implement any instrument.
- Article 4, paragraph 1 of the text is a broad provision, comprising text that the facilitators believe is convergent, and that contemplates the establishment of measures to ensure the application of the instrument.
- Article 4, paragraph 2, which the facilitators present as an optional addition to article 4, paragraph 1, contemplates the establishment of a further layer of application measures in the form of enforcement procedures, sanctions and remedies. Clauses 4.2.1 and 4.2.2 are optional additions to article 4, paragraph 2, and provide additional details regarding enforcement measures.
- Article 4, paragraph 3, which the facilitators present as an optional addition to article 4, paragraph 1, contemplates the possibility of alternative dispute settlement mechanisms.
- Article 4, paragraph 5 of former Option 2 reads as follows: “To promote relevant measures for the carrying-out of cultural expertise, that take into consideration customary laws, protocols and community procedures for the purposes of dispute settlement.” The facilitators were not able to include this language, and suggest that the proponent(s) clarify their intent.

## COMMENTS BY THE FACILITATORS ON ARTICLE 5

### *Elements of convergence*

- (i) general suitability of Member States/Contracting Parties establishing an authority (or authorities) in connection with this instrument

### *Elements of divergence*

- (i) the specific functions of any authority
- (ii) concept of prejudice to national law and/or the right of owners/holders to administer their rights

### *Other observations*

- With regard to former language stating that “In the case that the Member State decides thus that they should establish this authority”, the facilitators suggest to add the phrase “of any such authority” to make this concept implicit.
- The facilitators consider that the concept contained in the phrase “under protection of its beneficiaries” previously found in 5.1(a) could be captured by the phrase “to the extent authorized by the [owners]/[holders]”, which is now found in paragraph 1.
- While the list attached to 5.1 formerly contained alternatives, the facilitators considered that these alternatives were, in fact, distinct functions, and not simply alternatives. The facilitators therefore integrated these alternatives as distinct elements of the list.
- The language formerly found in 5.4 has been integrated in 5.1 by the facilitators.

## COMMENTS BY THE FACILITATORS ON ARTICLE 6

### *Elements of convergence*

- (i) former Options 1 and 2 were generally identical from paragraphs 6.1 to 6.3 inclusively, including the alternative language for 6.3, and have thus been merged

### *Elements of divergence*

- (i) exception/limitation providing for the use of traditional knowledge in cultural institutions (was present only in former Option 1, currently paragraph 6.5)
- (ii) exception/limitation providing for the creation of an original work of authorship inspired by traditional knowledge (was present only in former Option, currently paragraph 6.5)
- (iii) concept of prior informed consent in the alternative language for paragraph 6.3 (was present only in former Option 2)

## COMMENTS BY THE FACILITATORS ON ARTICLE 7

### *Elements of divergence*

- (i) whether the term of protection should/shall be automatically linked to the fulfillment of the criteria for eligibility found in Article 1, or whether the term of protection may be set by Member States but also based on the fulfillment of the criteria for eligibility

### *Additional observations*

- For Article 7, the facilitators note that two main positions were presented in Plenary (one that contemplates some form of perpetual protection, and another one that would allow Member States/Contracting Parties to limit the protection based on the “characteristics and value of traditional knowledge”).
- Option 1 is accompanied by optional additions. Facilitators believe that these represent proposals made during the current IGC session, and further believe that all of those optional additions would be part of Option 1, and not Option 2.
- Option 2 is not accompanied by optional additions.

COMMENTS BY THE FACILITATORS ON ARTICLE 8

- The facilitators understand that the Alternative seeks to merge 8.1 of Option 1 with 8.2 of Option 2.

## COMMENTS BY THE FACILITATORS ON ARTICLE 10

- For Article 10, the facilitators note that two main positions were presented in Plenary (one that contemplates some international instruments that should/shall be consistent with the general legal framework, and another one that contemplates that the protection under any instrument should/shall not affect the protection provided in international instruments. The facilitators have merged these positions into a single provision.
- The language is accompanied by optional additions. Facilitators believe that these represent proposals made during the current IGC session.

## COMMENTS BY THE FACILITATORS ON ARTICLE 11

The facilitators have removed language formerly found under this Article and which read as follows:

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

Reciprocity; or

An appropriate means of recognizing foreign rights holders.

[Annex C follows]

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

## **Introduction**

This text represents the results at the conclusion of the IGC's 22<sup>nd</sup> session, in accordance with the mandate of the WIPO General Assemblies (contained in WO/GA/40/7). It represents a work in progress.

## **Facilitator's Notes**

This text has been prepared by the facilitator. Articles 1, 2 and 5 were further amended as a result of deliberations by the expert group. All other articles are the work of the facilitator only, based on the discussions that took place in the plenary. Articles 4, 8, 9, 10, 11 and 12 have been placed in brackets to reflect that some delegations either raised concerns about what the facilitator had proposed for these articles or wished to reflect further.

The objective has been to reduce the number of options and simplify the text. In preparing the text, the facilitator considered this objective, and took into account suggestions made during the first plenary discussion and in the expert group (for those articles discussed by the expert group). The facilitator did not have the opportunity to redraft after the second plenary discussion.

A commentary has been prepared for each article, which explains the suggested changes to each article, and identifies a number of outstanding issues.

Where options or alternatives are used, this text is not bracketed. However, where there is no consensus within options, brackets have been used.

Note that references to "shall" or "should" have been changed to "shall/should" throughout the document.

As the IGC did not have time to address the policy objectives and principles, this version of the text notes that they will be discussed at a later stage.

OBJECTIVES (to be discussed at a later stage)

The protection of traditional cultural expressions should aim to:

Recognize value

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

Promote respect

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

Meet the actual needs of communities

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

Prevent the misappropriation and misuse of traditional cultural expressions

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

Empower communities

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

Support customary practices and community cooperation

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

Contribute to safeguarding traditional cultures

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

Encourage community innovation and creativity

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

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

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

Contribute to cultural diversity

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

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

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

Preclude unauthorized IP rights

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

Enhance certainty, transparency and mutual confidence

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

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

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

## ARTICLE 1

### SUBJECT MATTER OF PROTECTION

#### *Definition of Traditional Cultural Expressions*

1. Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof,

*Alternative 1:* in which traditional culture [and knowledge] are embodied

*Alternative 2:* which are indicative of traditional culture [and knowledge]

[which pass from generation to generation and between generations], including, but not limited to:

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

#### *Criteria for eligibility*

2. Protection extends to traditional cultural expressions that are:

- (a) [the result of the creative intellectual activity] of;
- (b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or]
- (c) [held], maintained, used or developed as part of the cultural or social identity [or heritage] by

the beneficiaries as defined in Article 2.

3. The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and where applicable, regional law.

## ARTICLE 2

### BENEFICIARIES OF PROTECTION

Beneficiaries of protection are indigenous [peoples] or [local communities], [or as determined by national law or by treaty] [who hold, maintain, use or develop] the traditional cultural expressions as defined in/determined by Article 1.

## ARTICLE 3

### SCOPE OF PROTECTION

#### *Option 1*

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

#### *Option 2*

Adequate and effective legal, administrative or policy measures shall/should be provided to [safeguard the economic and moral interests of the beneficiaries, including but not limited to]:

- (a) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions;
- (b) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (c) prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;
- (d) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and

*[there are two options for paragraph (e), which deals with commercial exploitation]*

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

(e) *Alternative 2:* ensure the beneficiaries have exclusive and [inalienable] collective rights to authorize and prohibit the following in relation to their traditional cultural expressions:

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

[ARTICLE 4

ADMINISTRATION OF RIGHTS/INTERESTS

*Option 1 (merger of existing options)*

1. Where so requested by the beneficiaries,

*Alternative 1:* a competent authority (regional, national or local)

*Alternative 2:* a national competent authority

may, to the extent authorized by the beneficiaries, and in accordance with:

*Alternative 1:* the traditional-decision-making and governance processes of the beneficiaries

*Alternative 2:* customary protocols, understandings, laws and practices

*Alternative 3:* national law

*Alternative 4:* national procedure

*Alternative 5:* international law

carry out the following functions (but need not be limited to such functions):

- (a) conduct awareness-raising, education, advice and guidance functions;
- (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
- (c) grant licenses;
- (d) collect monetary or non-monetary benefits from the use of the traditional cultural expressions and provide them to the beneficiaries [for the preservation of traditional cultural expressions];
- (e) establish the criteria to determine any monetary or non-monetary benefits;
- (f) provide assistance in any negotiations for the use of the traditional cultural expressions and in capacity building;
- (g) [If determined by national law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights in relation to a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to a community]

[2. The management of the financial aspects of the rights shall/should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries].

*Option 2 (short option)*

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

## ARTICLE 5

### EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions shall/should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the contracting parties/member States/members where applicable].
2. Limitations on protection shall/should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional or cultural context.
3. Contracting parties/Member States/Members may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

Alternative 1:

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

Alternative 2:

- (a) is limited to certain special cases;
- (b) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
- (c) does not unreasonably prejudice the legitimate interests of the beneficiaries.

4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following shall/should be permitted [only with the free prior and informed consent of the beneficiaries]:

- (a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education;
- (b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions].

5. [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall/should not be prohibited by the protection of traditional cultural expressions].

ARTICLE 6  
TERM OF PROTECTION

*Option 1*

1. Protection of traditional cultural expressions shall/should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,

2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, shall/should last indefinitely.

*Option 2*

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

ARTICLE 7  
FORMALITIES

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

[ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

1. (Option 1): Appropriate measures shall/should be provided, in accordance with national law, to ensure the application of this instrument, including legal, policy or administrative measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent.
1. (Option 2): Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies including criminal and civil remedies, shall/should be available in cases of breach of the protection for traditional cultural expressions.
2. The means of redress for safeguarding the protection granted by this instrument shall/should be governed by the national law of the country where the protection is claimed.
3. [Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall/should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.<sup>1</sup>]

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<sup>1</sup> Such as the WIPO Arbitration and Mediation Center.

[ARTICLE 9  
TRANSITIONAL MEASURES

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

*Option 1*

2. The state shall/should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

*Option 2*

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, shall/should be brought into conformity with the provisions within a reasonable period of time after they enter into effect/force, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall/should have the right to recover such traditional cultural expressions.]

[ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

*Wild card (merger of Options 1 and 2)*

Protection under this instrument shall/should take account of, and operate consistently with, other international instruments, including those dealing with intellectual property and with cultural heritage.]

[ARTICLE 11

NATIONAL TREATMENT

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

[ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional cultural expressions are located in territories of different contracting parties/member States/members, those contracting parties/member States/members shall/should co-operate in addressing instances of trans-boundary traditional cultural expressions.]

## COMMENTS BY THE FACILITATOR

### COMMENTS ON ARTICLE 1

The following changes have been made to create Rev. I:

1. To achieve some structural consistency with the traditional knowledge (TK) draft text, two subheadings – definition of TCEs and criteria for eligibility – have been added.
2. As there was significant commonality between the two options, they have been merged to create one option, but with the points of disagreement or policy difference highlighted using square brackets, or through the use of alternatives. This approach allows us to better identify the areas of convergence and divergence.
  - (i) In the definition of TCEs the basic categories of TCEs are agreed, so are “clean” text, but we disagree on whether to include examples, so the examples are in square brackets; and
  - (ii) Consistent with the approach taken in the TK text, the two options for eligibility criteria have been condensed into one list. This should allow the IGC to more easily identify the eligibility criteria that can be agreed upon. Note also that a number of eligibility criteria referred to the definition of beneficiaries in Article 2. To avoid repetition, this reference to Article 2 now appears at the end of the list.
3. In the text from IGC 19, the concept of passing TCEs from generation to generation was dealt with in two different ways. Under one approach it was in the definition, and in the other it was dealt with in the eligibility criteria. In this version, it is included in the definition, which is consistent with the approach taken in the TK text. Note that this concept was objected to by one delegation during the first plenary, so the phrase now appears in square brackets.
4. A number of submissions were made during the first plenary to add matters to the definition of TCEs. This has resulted in the following changes to the text:
  - (a) To address the fact that works of mas can be both tangible and intangible, the example of works of mas has been moved to category (c);
  - (b) The example of handmade carpets has been added to category (d). During the expert group there was no objection to this from the proponents of the list approach;
  - (c) The reference to “traditional games and sports” has been changed to “games and traditional sports”;
  - (d) The concept of “generation to generation” has been supplemented with “between generations,” to address the situation that TCEs can skip generations; and
  - (e) In the expert group the brackets around “combination thereof” in paragraph 1 were removed to reflect that there could be three categories: tangible TCEs, intangible TCEs, and TCEs that are a combination of tangible and intangible elements (e.g., works of mas).
5. There was a proposal during the first plenary to refer to adaptations in relation to each category of TCEs; this has been reflected as a new sub-paragraph (e). The expert group discussed this issue and was generally of the view that it was not necessary to refer specifically to adaptations, because the fact that TCEs evolve over time was already captured in eligibility criterion (c) which refers to TCEs being developed. There was also the risk of confusion with the

concept of adaptation that appears in Article 3. The delegation that suggested the addition of adaptations has been asked to consider if their concern could be addressed elsewhere.

6. The two proposals for paragraph 3, which provides domestic flexibility concerning the language used to describe TCEs in national law have been merged. There were two differences in the proposals:

- (i) One option referred to “terminology” while the other referred to “the specific choice of terms.” The facilitator used the “terminology” option, as it seems to be plainer drafting; and
- (ii) The second difference was whether to refer to the national level or to national, regional, and sub-regional levels. This version uses “national law and where applicable, regional law.” The reference to regional law was added by the expert group to address the situation of the European Union (further work may be required to determine if regional law is the most appropriate way to address the concept). The term “law” has been used as it is broader than “legislation” (law being a term that includes legislation, case law and regulation, etc.) and can accommodate federal systems.

Outstanding issues:

1. In the first sentence of the definition, the IGC was not able to agree on whether to include the term “artistic.” Some of those who propose it say it is necessary to distinguish TCEs from purely functional forms; those who oppose it point out that TCEs are not necessarily artistic and say it is subjective and limits the definition. The expert group considered whether there was an alternative to “artistic” that would meet the concerns on both sides, but was not able to do so.
2. In the two options under the definition of TCEs, there is no agreement on whether to say “in which traditional culture and knowledge are embodied” or “which are indicative of traditional culture and knowledge.” The expert group was leaning towards “embodiment,” but was not able to reach consensus. The proponents of “indicative” said that they could be flexible to consider alternative language that would address the relationship with TCEs.
3. A more substantive issue in the two alternatives in the definition of TCEs is the reference to “knowledge.” For many indigenous peoples, TCEs and TK are closely connected, with TCEs being the outward manifestation of the TK, which means it is important for the definition of TCEs to refer to TK. However, some delegations have concerns about referring to TK in the definition of TCEs, as this may result in duplicating the protection provided to TK across the two sets of draft articles. The expert group tried but failed to address the concern about duplication, while still retaining a reference to TK in the definition of TCEs. Two options were discussed: the use of a footnote or moving the reference to knowledge to the eligibility criteria.
4. There are still disagreements on whether the definition of TCEs should be based on general categories or should include lists of examples. The proponents of including the examples say that the list is only illustrative and that it provides greater certainty that particular subject matter is protected. The proponents of not including examples argue that it is not necessary for the examples to be listed to be covered, and consider that the inclusion of some examples leads us down the path of trying to include elements and inadvertently leaving things out. There was interest from some experts in exploring the use of a clarifying footnote to illustrate the examples in the lists. One of the key issues is whether the use of the lists is the only way to achieve the illustrative purpose.
5. In the list of eligibility criteria, the following issues have yet to be resolved:
  - (a) There is disagreement on whether “creative intellectual activity” in paragraph 2(a) should be a criterion. The proponents of the concept took it from the WIPO Convention,

adding “creative” to intellectual activity. They could not conceive of situations where a TCE would not result from some intellectual activity. There were concerns from others that not all instances of TCEs would qualify as intellectual activity (e.g., rituals), and questions about how one would prove this criterion. Is there another way to reflect this concept that would address the concerns of those who oppose it?;

(b) In paragraph 2(b), there is disagreement on whether to say “distinctive of or the unique product” or “associated with.” One delegation was concerned that “associated with” is not adequate to exclude unauthentic TCEs, and suggested that the issue be given further reflection and discussion; and

(c) In paragraph 2, there may be some unnecessary repetition in the reference to “as part of the cultural or social identity or heritage” in both (b) and (c). This could be considered further.

## COMMENTS ON ARTICLE 2

The following changes have been made to create Rev. I:

- Options 1 and 2 of the IGC 19 text have been replaced with a single paragraph. The reference to “as determined by national law” has been used to address the issues the IGC had been discussing concerning “nations.” The reference to “indigenous peoples or local communities” was an attempt to address the objections by some delegations to using the term “indigenous peoples.” This was not successful which is why “peoples” is in brackets, as is “local communities” as there is a concern by some that the term is not appropriately defined. The phrase “who hold, maintain, use or develop” is in brackets while some delegations do some further checking about the relationship to this phrase as used in Article 1.
- The inclusion of the term “treaty” in addition to national law caused some confusion. The intended meaning is to refer to agreements with tribes in the United States. In this context treaty does not mean an international convention. The delegation that proposed the inclusion of “treaty” indicated that it would consult further to determine if such treaties could be included in the concept of national law.
- Option 3 has been deleted as there was no support for this option.

## COMMENTS ON ARTICLE 3

The following changes have been made to create Rev I:

- The basic policy options identified at IGC 19 have not been changed:
  - (a) The policy approach underlying Option 1 is that States should have maximum flexibility to determine the scope of protection; and
  - (b) The policy approach in Option 2 is more detailed and prescriptive, and includes two approaches to the issue of commercial exploitation within it. One is to prescribe the kinds of activities that should be regulated (the regulate approach). The other is a rights-based approach.
- Minor formatting changes have been made to more clearly identify the alternatives for paragraph (e) under Option 2.

3. In Option 1, the reference to “beneficiaries of TCEs” has been changed to “concerning their TCEs” to better reflect the relationship between the interests and the TCEs. This is a modification of the language suggested by the Delegation of Canada.
4. In Option 2, language has been added to the beginning of the chapeau, as suggested in plenary, which is: “Adequate and effective legal or administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to.” This is reflected in square brackets, as the facilitator was not sure what degree of support it may have with other proponents of Option 2.
5. In Alternative 2 of subparagraph (e) of Option 2, one delegation expressed concerns about the use of the term “inalienable.” This word has been bracketed.
6. Similarly, in Option 2, subparagraph (a), one delegation had a concern about referring to secret TCEs only. The word “secret” has been bracketed to remind delegations to discuss it. The facilitator recalls that the sub paragraph refers to secret because it is only secret TCEs that have not yet been disclosed.
7. Alternative 2 from paragraph (e) in Option 2 – concerning equitable remuneration (as an alternative to an exclusive right) – has been removed. The facilitator did not hear support for this option.

#### COMMENTS ON ARTICLE 4

The following changes have been made to create Rev I:

1. Note: this is the first time a facilitator has worked on Article 4.
2. In the new Option 1, the options from IGC 19 have been merged and cleaned to more clearly identify the key concepts and remove instances of repetition. The key concepts identified are as follows:
  - (a) The administration of rights being at the behest of the beneficiaries (there are several variations of this in paragraph 1 of the IGC 19 text, e.g. “management of the rights belongs to the beneficiaries,” “where authorizations are granted/given,” “acting at the request ...”, “Where so requested by and in consultation with the beneficiaries,” “with prior informed consent and approval and involvement”), and this concept was also repeated within the suggested activities for the authority. In Rev. I, the phrase “where so requested by and to the extent authorized by the beneficiaries” is used to reflect the concept, as it seems to be the plainest and most encompassing form of drafting. There is no need to repeat the concept in the list of functions.
  - (b) Concerning the functioning of the authority being in accordance with something, the options are:
    - (i) Traditional decision making and governance processes (this concept was repeated in the suggested activities for the authority). Note: in one place the IGC 19 text referred to “governance” and in another to “government.” It has been assumed that the later was a typo;
    - (ii) Customary law (Rev 1 uses the phrase “customary protocols, understandings, laws and practices” consistent with the TK text);
    - (iii) National law;

- (iv) National procedure; and
- (v) International law

(c) A set of functions for the authority (there is a range of options). Rev. I adds the concept of an authority not being limited to the list of possible functions, which is taken from the TK text. The lists of functions in paragraphs 1 and 2 have been combined, with repetition removed. It was not clear from the IGC 19 text whether or not there was support for particular functions; the functions are therefore not in square brackets at this stage. The exception is that the text in paragraph (d) “the preservation of traditional cultural expressions” is bracketed as this was an addition to the proposal at IGC 19 that did not seem to have widespread support.

(d) As to how to describe the authority, there are two basic policy approaches: (1) those who consider that the administration of rights is essentially a matter for indigenous peoples and local communities; and (2) those who consider that there should be government intervention through a national authority. Option 1 tries to encompass all the possibilities for a competent authority (national, regional or local). Option 2 refers to a national competent authority. Could we delete Option 2 if Option 1 covers all the possible approaches?

3. In the new Option 1, a new subparagraph (g) has been added to reflect the proposal from the Delegation of India. This has been edited slightly to refer to rights in relation to a TCE rather than rights of a TCE. This is in brackets to show that it is a new idea that has not yet been discussed by the IGC.

4. In addition to the key themes, the original paragraphs 2 and 3 contained proposals concerning reporting to WIPO and financial management. There was fairly widespread support for deleting paragraph 3 concerning reporting to WIPO, so this has been deleted. The new paragraph 2 is in square brackets because some delegations have expressed objections thereto.

5. The title has been changed to “administration of rights” to create consistency with the TK text. Some delegations suggested that we say rights/interests until we know the status of the instrument. It is suggested that that exact nature of the title be addressed at a later time when we have more certainty about how the instrument would deal with rights or interests.

6. A new much shorter Option 2 has been added, following the suggestions of a number of delegations. The point of this option is that the administration of rights is primarily a matter for indigenous peoples and local communities (etc.), so there is no need to be prescriptive. Where government assistance is sought, the specific functions would be a matter for the particular community and government to determine. The drafting has been inspired by the proposals of the Saami Council and the European Union, but taking language from the beginning of the long option. “Rights/interests” has been used to address the concerns of delegations that pointed out we have not yet decided this point, and the reference to “instrument” is also bracketed because we have not decided on the type of instrument.

Issues to discuss:

1. Is Option 2, the short option, a useful way of bridging our differences under the long option?
2. In Option 1 paragraph 1, do we need all the alternatives? For example, do we need national procedure and national law? And how would international law be relevant? Is the reference to “the traditional-decision-making and governance processes of the beneficiaries”

covered by “customary protocols, understandings, laws and practices”? Can we use just one of these terms?

## COMMENTS ON ARTICLE 5

The following changes have been made to create Rev. I:

1. As the only differences between Options 1 and 2 were in paragraphs 4 and 5, the two options have been merged, with square brackets around paragraphs 4(b) and 5 to indicate where there was no agreement concerning mandatory exceptions for independent creation and permitted acts under copyright and trade mark law.
2. As requested by the delegation of Brazil, a third step has been added to complete the three-step test under paragraph 3. The extra step is “certain special cases.”
3. Some delegations had concerns about the exclusion of secret TCEs from paragraph 5, so part of this paragraph has been put in square brackets. These delegations are going to consult further on this point.
4. Some minor changes to paragraph 4(a) and (b) have been made, to add references to “education” and “borrowed from.” As these suggestions seem fairly non-controversial they have not been put in brackets at this stage.
5. In paragraph 4, the Delegation of Australia supported the proposal from the representative of FAIRA to add the reference to prior informed consent. This has been added in brackets as there is no consensus on this idea.

Outstanding issues:

1. Can we agree on one of the alternatives under paragraph 3? There seems to be more support for Alternative 2 than Alternative 1. If we cannot choose one of the formulations for drafting exceptions in national law, could we run the two together?
2. The facilitator was attracted to the idea of restructuring some of the exceptions language into the scope article (especially the matters dealt with in paragraphs 4(b) and 5), however the expert group was not able to address this issue, as key issues on the scope of protection remain unresolved.

## COMMENTS ON ARTICLE 6

The following changes have been made to create Rev. I.

Paragraph 3 of Option 1 has been removed as many delegations pointed out that it did not add anything to paragraph 1, which would apply to secret and non-secret TCEs in the same way.

## COMMENTS ON ARTICLE 7

The following changes have been made to create Rev. I:

One delegation proposed bracketing the opening phrase “as a general principle,” but there was no opportunity to discuss the implications of doing this. The facilitator recalls that this language

is to cover the situation that formalities could be an optional requirement, but would not stand in the way of protection being offered.

## COMMENTS ON ARTICLE 8

The following changes have been made to create Rev. I:

1. Note: this is the first time a facilitator has worked on Article 8. The approach taken has been to more clearly identify the different policy approaches in the text (the flexible versus the prescriptive approach), and the areas of convergence and divergence.
2. One area of convergence is the idea that redress should be determined at the national level (this was in both options of the IGC 19 text). In response to a suggestion of one delegation, the reference to legislation has been changed to national law, to be consistent with other references in the document. This is now paragraph 2.
3. There was no consensus on the concept of alternative dispute resolution, so this is in brackets, but it could fit with either Option 1 or 2. This is now paragraph 3.
4. There are two options for paragraph 1 (flexible and prescriptive). In Option 1 of paragraph 1:
  - (a) Paragraphs 1 and 2 of the original Option 1 have been combined to streamline the drafting;
  - (b) Paragraph 2 of the old Option 1 had simply referred to “measures.” The phrase “legal, policy or administrative measures” has been added from the TK text, to provide some consistency between the two texts;
  - (c) The language “contracting parties” has been removed, and the new paragraph 1 Option 1 now starts in a similar way to new paragraph 1 Option 2. This achieves some consistency between the options for paragraph 1, and means we do not need to include both “contracting parties” and “member States.” That issue could be dealt with at the point that the IGC addresses the status of the instrument.
5. In Option 2 of paragraph 1, the reference to “border measures” has been bracketed because one of the proponents of the more specific approach had concerns about its inclusion.
6. Two paragraphs of Option 2 of the text from IGC 19 have been deleted, because they deal with issues that are or could be addressed in other articles. These are:
  - (a) Paragraph 2: the possible functions of a competent authority are dealt with in Article 4, concerning the administration of rights. If delegations consider this is an important function, it is suggested that this issue be dealt with in Article 4 (it has not yet been added to Article 4 in Rev. I).
  - (b) Paragraph 4: to create greater consistency with the TK text, it is suggested that this issue be dealt with in a new article on “trans-boundary cooperation.”
7. In response to the suggestion of some delegations, the reference to “rights” in the title has been complemented with a reference to “interests,” as we have not yet agreed on the scope of protection.

Outstanding issue:

Do delegations agree that matters concerning the functions of a competent authority and trans-boundary cooperation are better addressed in other articles?

#### COMMENTS ON ARTICLE 9

The following changes have been made to create Rev. I.

1. There were suggestions from some delegations concerning the language “coming into force.” It was suggested that “coming into effect” is more common language, or that we should talk about the provisions commencing.
2. “Rights/interests” has been included in line with the concerns of some delegations that we have not yet determined the scope of protection.

#### COMMENTS ON ARTICLE 10

The following changes have been made to create Rev. I:

1. The heading has been replaced with the equivalent heading from the TK text, for reasons of consistency and simplification.
2. Paragraph 2 of Option 1 has been deleted, as it is a provision about the term of protection. Term is dealt with in Article 6.
3. Options 1 and 2 have been combined to create the “wild card” option. The combined text seeks to balance the reference to international legal instruments that deal with intellectual property and those that deal with cultural heritage. In creating this option the drafting has been simplified. Language from the TK text (“take account of, and operate consistently with”) has been used to create some consistency between the two texts.
4. There were some interesting proposals put forward during the plenary, however the facilitator sought to be ambitious by reducing rather than increasing the number of options. The proposal put forward by the Delegation of Canada was as follows:
  1. *The provisions of this instrument shall/should not affect the rights and obligations of any State deriving from any existing international agreement. This paragraph is not intended to create a hierarchy between this instrument and other international instruments.*
  2. *Nothing in this instrument shall prevent the States from developing and implementing other relevant international agreements provided that they are supportive of and do not run counter to the objectives of this instrument.*

Outstanding issues:

1. Is the “wild card” option a possible way forward?
2. Three forms of language have been used in the existing options and in the TK text to reflect the principle of consistency with existing international obligations. It would be useful to discuss the differences between them, and whether we should use the language consistent with the TK text. The three options are:
  - (a) “take account of, and operate consistently with” (from the TK text);

- (b) “does not replace and is complementary to” (Option 1 from IGC 19)
- (c) “leave intact and should in no way affect” (Option 2 from IGC 19)

#### COMMENTS ON ARTICLE 11

No changes have been made to create Rev. I.

Outstanding issues:

1. Because these issues are tied to the later question of the status of the instrument, and we have not yet had a thorough policy discussion about the different options for addressing international enforceability issues (national treatment, reciprocity, material reciprocity, and mutual recognition, etc.), the facilitator has not spent time redrafting the clause on national treatment. At some future point the Secretariat may be able to aid this discussion by preparing a range of fictional scenarios (country A and B, etc.), which would show the practical effect of the different options.
2. If the IGC does decide on national treatment, then the LMC text is an alternative to consider.

#### COMMENTS ON ARTICLE 12

Outstanding issue:

The TCE text does not currently contain an article on trans-boundary cooperation. In the interests of achieving some consistency with the TK text, does the IGC wish to include an article on trans-boundary co-operation in the TCE text? A simplified version of the TK text has been included for discussion purposes. The facilitator also notes that the LMC text contains an article on trans-boundary cooperation.

[End Annex C and of document]