

## **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**Twenty-First Session**  
**Geneva, April 16 to 20, 2012**

### **THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES**

*Document prepared by the Secretariat*

#### **INTRODUCTION**

1. At its Nineteenth Session, held from July 18 to 22, 2011, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (‘the Committee’) requested that document WIPO/GRTKF/IC/19/5 (‘The Protection of Traditional Knowledge: Draft Articles’) be transmitted as a working document to this session of the Committee. It further requested that Articles 1, 2, 3 and 6 of the document be replaced by the options for those articles, together with their associated comments and policy considerations, as presented to the Committee during the session by the facilitators on traditional knowledge, Ms. Andrea Bonnet López (Colombia) and Mr. Nicolas Lesieur (Canada). In addition, the ‘Policy Objectives’ and ‘General Guiding Principles’ appearing in document WIPO/GRTKF/IC/18/5 (‘The Protection of Traditional Knowledge: Revised Objectives and Principles’) should be added to this document, in the same manner that corresponding ‘Policy Objectives’ and ‘General Guiding Principles’ appear in document WIPO/GRTKF/IC/19/4 (‘The Protection of Traditional Cultural Expressions: Draft Articles’).<sup>1</sup>

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<sup>1</sup> Draft Report of the Nineteenth Session of the Committee (WIPO/GRTKF/IC/19/12 Prov. 2)

*Preparation and structure of this document*

2. Pursuant to the decision above:

- (a) the “Policy Objectives” and “General Guiding Principles” appearing in document WIPO/GRTKF/IC/18/5 (“The Protection of Traditional Knowledge: Revised Objectives and Principles”) have been added, in the same manner that corresponding “Policy Objectives” and “General Guiding Principles” appear in document WIPO/GRTKF/IC/19/4 (“The Protection of Traditional Cultural Expressions: Draft Articles”);
- (b) Articles 1, 2, 3 and 6 of WIPO document WIPO/GRTKF/IC/19/5 (“The Protection of Traditional Knowledge: Draft Articles”) have been replaced by the options for those articles, together with their associated comments and policy considerations, as presented by the facilitators at the Nineteenth Session of the Committee; and
- (c) Articles 4, 5, 7, 8, 9, 10, 11 and 12 of WIPO document WIPO/GRTKF/IC/19/5 (“The Protection of Traditional Knowledge: Draft Articles”) have been retained.

*3. The Committee is invited to review and comment on the articles contained in the Annex towards developing a revised and updated version thereof.*

[Annex follows]

THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES

POLICY OBJECTIVES (to be discussed at a later stage)

The protection of traditional knowledge should aim to:

Recognize value

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

Promote respect

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

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

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, respect their rights as holders and custodians of traditional knowledge, contribute to their welfare and economic, cultural and social benefit and [reward] recognize the value of the contribution made by them to their communities and to the progress of science and socially beneficial technology;

Promote conservation and preservation of traditional knowledge

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

Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

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

Support traditional knowledge systems

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

Contribute to safeguarding traditional knowledge

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

Repress [unfair and inequitable uses] misappropriation and misuse

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

Respect for and cooperation with relevant international agreements and processes

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

Promote innovation and creativity

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

Ensure prior informed consent and exchanges based on mutually agreed terms

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

Promote equitable benefit sharing

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

Promote community development and legitimate trading activities

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

Preclude the grant of improper IP rights to unauthorized parties

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

Enhance transparency and mutual confidence

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

Complement protection of traditional cultural expressions

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

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

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

(iii) meet the actual needs of holders of traditional knowledge;

(iv) promote conservation and preservation of traditional knowledge;

(v) support traditional knowledge systems;

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

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

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

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

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

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

- (a) Principle of responsiveness to the [needs and expectations of] rights and needs identified by traditional knowledge holders
- (b) Principle of recognition of rights
- (c) Principle of effectiveness and accessibility of protection
- (d) Principle of flexibility and comprehensiveness
- (e) Principle of equity and benefit sharing
- (f) Principle of consistency with existing legal systems governing access to associated genetic resources
- (g) Principle of respect for and cooperation with other international and regional instruments and processes
- (h) Principle of respect for customary use and transmission of traditional knowledge
- (i) Principle of recognition of the specific characteristics of traditional knowledge
- (j) Principle of providing assistance to address the needs of traditional knowledge holders

## ARTICLE 1

### SUBJECT MATTER OF PROTECTION

#### DEFINITION OF TRADITIONAL KNOWLEDGE

##### *Option 1*

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

##### *Option 2*

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

#### CRITERIA FOR ELIGIBILITY

##### *Option 1*

1.2 Protection extends to traditional knowledge that is:

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

##### *Alternative*

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

or

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

(e) not in the public domain;

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

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



*Option 2*

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

## COMMENTARY ON ARTICLE 1 BY THE FACILITATORS

### Option 1: Policy approach

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

### Option 2: Policy approach

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

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

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

### Comments on policy approach

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

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

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

### Comments on Article 1.2

The text has been streamlined into two options.

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

## ARTICLE 2

### BENEFICIARIES OF PROTECTION

#### *Option 1*

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

#### *Option 2*

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

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

## COMMENTARY ON ARTICLE 2 BY THE FACILITATORS

### Option 1: Policy approach

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

### Option 2: Policy approach

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

### Comments on policy approach

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

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

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

ARTICLE 3  
SCOPE OF PROTECTION

*Option 1*

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

- (a) prevent the unauthorized disclosure, use or other exploitation of [secret] traditional knowledge;
- (b) where traditional knowledge is knowingly used outside the traditional context:
  - (i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;
  - (ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders.
- (c) encourage traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.

*Optional addition*

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

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

*Option 2*

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

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

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

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

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

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

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

(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders;

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

## COMMENTARY ON ARTICLE 3 BY THE FACILITATORS

### General comments

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

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

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

### Option 1: Policy approach

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

### Option 2: Policy approach

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

### Comments on policy approach

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

### Comments on Article 3.1

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

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

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

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



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

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

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

## ARTICLE 4

### SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

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

#### *[Option 1*

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

#### *Option 2*

4.2 Contracting Parties undertake to implement the mechanism.

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

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

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

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

#### *Option 3*

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

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

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

## ARTICLE 5

### ADMINISTRATION OF RIGHTS

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

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

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

#### *Alternative*

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

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

#### *Alternatives*

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

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

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

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

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

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

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

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

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

ARTICLE 6  
EXCEPTIONS AND LIMITATIONS

*Option 1*

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

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

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

*Alternative*

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

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

*Alternative*

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

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

- (a) the use of traditional knowledge in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation should be permitted; and
- (b) the creation of an original work of authorship inspired by traditional knowledge.

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

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

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

*Option 2*

6.1 Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context [consistent with national/domestic laws of the Member States].

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

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

*Alternative*

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

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

*Alternative*

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

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

## COMMENTARY ON ARTICLE 6 BY THE FACILITATORS

### Comments

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

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

ARTICLE 7

TERM OF PROTECTION

*[Option 1*

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

*[Option 2*

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

ARTICLE 8  
FORMALITIES

*Option 1*

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

*Option 2*

8.1 The protection of traditional knowledge requires some formalities.

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



## ARTICLE 9

### TRANSITIONAL MEASURES

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

#### *Option 1*

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

#### *Option 2*

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

## ARTICLE 10

### CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

#### *Option 1*

[10.1 Protection under this instrument shall take account of, and operate consistently with, other international [and regional and national] instruments [and processes] [in particular the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].]

#### *Option 2*

[10.1 [Protection under this instrument should leave intact] and should in no way affect the rights or the protection provided for in international legal instruments [in particular the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].]

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

#### *Alternative*

10.2 In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future.

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

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

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

Reciprocity; or

An appropriate means of recognizing foreign rights holders.

## ARTICLE 12

### TRANS-BOUNDARY COOPERATION

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

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

[End of Annex and of document]