

## **WIPO General Assembly**

### **Fifty-Sixth (26<sup>th</sup> Ordinary) Session** **Geneva, July 6 to 14, 2023**

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

*prepared by the Secretariat*

#### **I. INTRODUCTION**

1. The WIPO General Assembly, at its Fifty-Fourth (25<sup>th</sup> Ordinary) Session in October 2021, agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2022/2023 biennium.
2. The IGC's mandate for the 2022/2023 biennium, which was set out in document WO/GA/54/10, provides as follows:

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

“(a) The Committee will, during the next budgetary biennium 2022/2023, continue to expedite its work, with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property, which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).

“(b) The Committee’s work in the 2022/2023 biennium will build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues<sup>1</sup>.

“(c) The Committee will follow, as set out in the table below, a work program based on open and inclusive working methods for the 2022/2023 biennium, including an evidence-based approach as set out in paragraph (d). This work program will make provision for 6 sessions of the Committee in 2022/2023, including thematic, cross-cutting, and stocktaking sessions. The Committee may establish *ad hoc* expert group(s) to address a specific legal, policy, or technical issue<sup>2</sup>. The results of the work of such group(s) will be submitted to the Committee for consideration.

“(d) The Committee will use all WIPO working documents, including WIPO/GRTKF/IC/40/6, WIPO/GRTKF/IC/40/18, WIPO/GRTKF/IC/40/19 and the Chair’s Text on a *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, as well as any other contributions of Member States, such as conducting/updating studies covering, inter alia, examples of national experiences, including domestic legislation, impact assessments, databases, and examples of protectable subject matter and subject matter that is not intended to be protected; and outputs of any expert group(s) established by the Committee and related activities conducted under Program 4. The Secretariat is requested to continue to update studies and other materials relating to tools and activities on databases and on existing disclosure regimes relating to GRs and associated TK, with a view to identifying any gaps and continuing to collect, compile and make available online information on national and regional *sui generis* regimes for the intellectual property protection of TK and TCEs. Studies or additional activities are not to delay progress or establish any preconditions for the negotiations.

“(e) In 2022, the Committee is requested to provide to the General Assembly a factual report along with the most recent texts available of its work up to that time with recommendations, and in 2023, submit to the General Assembly the results of its work in accordance with the objective reflected in paragraph (a). The General Assembly in 2023 will take stock of progress made, and based on the maturity of the texts, including levels of agreement on objectives, scope, and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue negotiations.

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

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<sup>1</sup> Core issues include, as applicable, inter alia, definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs are entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.

<sup>2</sup> The expert group(s) will have a balanced regional representation and use an efficient working methodology. The expert group(s) will work during the weeks of the sessions of the IGC.

**WORK PROGRAM – 6 SESSIONS**

<b>Indicative Dates</b>	<b>Activity</b>
February/March 2022	(IGC 42) Undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument Duration 5 days.
May/June 2022	(IGC 43) Undertake negotiations on GRs with a focus on addressing unresolved issues and considering options for a draft legal instrument. Duration 5 days, plus, if so decided, a one day meeting of an <i>ad hoc</i> expert group.
September 2022	(IGC 44) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Possible recommendations as mentioned in paragraph (e) Duration 5 days.
October 2022	WIPO General Assembly Factual report and consider recommendations
November/December 2022	(IGC 45) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Duration 5 days, plus, if so decided, a one day meeting of an <i>ad hoc</i> expert group.
March/April 2023	(IGC 46) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s) Duration 5 days, plus, if so decided, a one day meeting of an <i>ad hoc</i> expert group.
June/July 2023	(IGC 47) Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Stocktaking on GRs/TK/TCEs and making a recommendation Duration 5 days.
October 2023	WIPO General Assembly will take stock of the progress made, consider the text(s) and make the necessary decision(s)."

3. In accordance with the mandate as reproduced above, the IGC provided a factual report with recommendations to the WIPO General Assembly in 2022, in document WO/GA/55/6. This report covered the period January 2022 to September 2022.

4. Paragraph (e) of the mandate for this biennium (quoted above) requests the IGC, in 2023, to “submit to the General Assembly the results of its work in accordance with the objective reflected in paragraph (a). The General Assembly in 2023 will take stock of progress made, and based on the maturity of the texts, including levels of agreement on objectives, scope, and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue negotiations.” This document is prepared pursuant to this decision.

## II. IGC SESSIONS IN 2023

5. Pursuant to the mandate for the 2022/2023 biennium and the work program for 2022 and 2023, the IGC has held four sessions since the WIPO General Assembly in 2022, as follows:

- (a) IGC 44, from September 12 to 16, 2022, on the subject of TK and TCEs;
- (b) IGC 45, from December 5 to 9, 2022, on the subject of TK and TCEs;
- (c) IGC 46, from February 27 to March 3, 2023, on the subject of TK and TCEs; and
- (d) IGC 47, from June 5 to 9, 2023, on the subject of TK and TCEs and taking stock of the progress made and making a recommendation to the 2023 WIPO General Assembly.

6. IGCs 44, 45 and 46 addressed certain cross-cutting issues on TK and TCEs, and developed “The Protection of Traditional Knowledge: Draft Articles Rev.” and “The Protection of Traditional Cultural Expressions: Draft Articles Rev.”.

7. IGC 47 continued to work on these texts, and decided that “The Protection of Traditional Knowledge: Draft Articles – Facilitators’ Rev.” (annex to document WIPO/GRTKF/IC/47/14, enclosed in the present document), and “The Protection of Traditional Cultural Expressions: Draft Articles – Facilitators’ Rev.” (annex to document WIPO/GRTKF/IC/47/15, enclosed in the present document), as at the close of June 7, 2023, be transmitted to Agenda Item 6 (“Taking Stock of Progress and Making a Recommendation to the General Assembly”) of IGC 47.

8. In accordance with the Committee’s mandate for the 2022/2023 biennium and the work program for 2023, IGC 47, under Agenda Item 6, took stock of the progress made during the 2022/2023 biennium, and confirmed that documents WIPO/GRTKF/IC/47/14 and WIPO/GRTKF/IC/47/15 be transmitted to the 2023 WIPO General Assembly.

9. IGC 47 also agreed to recommend to the 2023 WIPO General Assembly that the mandate of the Committee be renewed for the 2024/2025 biennium. The Committee further agreed to recommend to the 2023 WIPO General Assembly that the terms of the mandate and work program for 2024-2025 be as follows:

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

- “(a) The Committee will, during the next budgetary biennium 2024/2025, in a Member State driven process, continue its work on the protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs), with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to

intellectual property, which will ensure the balanced and effective protection of TK and TCEs.

- “(b) Noting that a Diplomatic Conference will be convened to conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources no later than 2024, the Committee will, during the next budgetary biennium 2024/2025, continue to discuss intellectual property issues concerning GRs as they relate to the mandate of the Committee.
- “(c) The Committee’s work in the 2024/2025 biennium will build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues<sup>1</sup>.
- “(d) The Committee will follow, as set out in the table below, a work program based on open and inclusive working methods for the 2024/2025 biennium, including an evidence-based approach as set out in paragraph (f). This work program will make provision for 4 sessions of the Committee in 2024/2025, including thematic, cross-cutting, and stocktaking sessions.
- “(e) The Committee may establish *ad hoc* expert group(s) to address specific legal, policy, or technical issues<sup>2</sup>. The results of such *ad hoc* expert group(s) shall be submitted to the Committee for its consideration.
- “(f) The Committee will use all WIPO working documents, including WIPO/GRTKF/IC/47/14 (The Protection of Traditional Knowledge: Draft Articles) and WIPO/GRTKF/IC/47/15 (The Protection of Traditional Cultural Expressions: Draft Articles), as well as any other contributions of Member States, such as conducting/updating studies covering, inter alia, examples of national experiences, including domestic legislation, impact assessments, databases, and examples of protectable subject matter and subject matter that is not intended to be protected; and outputs of any expert group(s) established by the Committee and related activities conducted under the capacity-building and technical assistance program of the Secretariat (the Traditional Knowledge Division). The Secretariat is requested to continue to update studies and other materials relating to tools and activities on databases and on existing disclosure regimes relating to GRs and associated TK, with a view to identifying any gaps and continuing to collect, compile and make available online information on national and regional *sui generis* regimes for the intellectual property protection of TK and TCEs. Studies or additional activities are not to delay progress or establish any preconditions for the negotiations.
- “(g) In 2025, the Committee is requested to submit to the General Assembly the results of its work in accordance with the objective reflected in paragraphs (a) and (b). The General Assembly in 2025 will take stock of progress made on GRs, in light of the Diplomatic Conference and IGC 48, TK and TCEs, and based on the maturity of the text(s) on TK and TCEs, including levels of agreement on objectives, scope, and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue negotiations.

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<sup>1</sup> Core issues include, as applicable, inter alia, definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs are entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.

<sup>2</sup> The expert group(s) will have a balanced regional and gender representation and use an efficient working methodology. Accredited representatives of Indigenous Peoples as well as local communities will be invited to participate, in line with past practice of the Committee.

- “(h) The General Assembly requests the Secretariat to continue to assist the Committee by providing Member States with necessary expertise and funding, in the most efficient manner, of the participation of experts from developing countries and LDCs, taking into account the usual formula for the IGC.
- “(i) The Secretariat is also requested to facilitate the effective participation of Indigenous Peoples as well as local communities in WIPO’s normative work related to GRs, TK and TCEs.

#### WORK PROGRAM – 4 SESSIONS

Indicative Dates	Activity
October/November 2024 (IGCs 48 and 49 will be held back-to-back)	IGC 48 Take stock of the progress made on GRs and TK associated with GRs and discuss any issues arising from the Diplomatic Conference. Duration 1 day (this one day session on GRs creates no precedence for future sessions of the Committee).
	IGC 49 Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Duration 5 days.
March 2025	IGC 50 Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Duration 5 days.
June 2025	IGC 51 Undertake negotiations on TK and/or TCEs with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s). Stocktaking on GRs/TK/TCEs and making a recommendation Duration 5 days.
July 2025	WIPO General Assembly will take stock of the progress made, consider the text(s) and make the necessary decision(s).”

### III. AD HOC EXPERT GROUP ON TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

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

11. Pursuant to this decision and the decisions of IGC 44, an *ad hoc* expert group on TK and TCEs met on December 4, 2022, prior to IGC 45. The documents prepared are available [online](#).

12. IGC 45 decided to establish an *ad hoc* expert group on TK and TCEs prior to IGC 46. Such an *ad hoc* expert group met on February 26, 2023. The documents prepared are available [online](#).

### IV. VIRTUAL ACTIVITIES DECIDED BY IGC 43

13. IGC 43 decided that the Secretariat “should organize further *ad hoc* virtual meetings of experts on possible disclosure requirements, and a virtual Seminar and/or other virtual technical meetings on information systems, registers and databases of GRs, TK and TCEs before IGC 47, and provide written reports on such meetings to the Committee. These meetings should include experts reflecting different interests and balanced geographical representation, and should not replace nor delay the text-based negotiations underway in the Committee.” On information systems, registers and databases of GRs, TK and TCEs, the Secretariat was invited “to issue an online survey which Member States and accredited observers could respond to, if they so wish”.

14. Pursuant to these decisions, the Secretariat issued an online survey, and organized *ad hoc* virtual meetings of experts on possible disclosure requirements, and virtual technical meetings on information systems, registers and databases of GRs, TK and TCEs. Document WIPO/GRTKF/IC/47/13 provides a factual report on these three virtual activities.

15. *The WIPO General Assembly is invited to:*

*(i) take note of the information contained in this document; and*

*(ii) renew the mandate of the IGC for the biennium 2024/2025 on the terms and according to the program set out in paragraph 9 above.*

[Documents WIPO/GRTKF/IC/47/14 and WIPO/GRTKF/IC/47/15 follow]

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

**Forty-Seventh Session**  
**Geneva, June 5 to 9, 2023**

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

*Document prepared by the Secretariat*

1. At the Forty-Seventh Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”), which is taking place from June 5 to 9, 2023, the Committee developed, on the basis of document WIPO/GRTKF/IC/47/4, a further text, “The Protection of Traditional Knowledge: Draft Articles – Facilitators’ Rev.”. The Committee decided that this text, as at the close of Agenda Item 5, on June 7, 2023, be considered by the Committee under Agenda Item 6 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee’s mandate for 2022-2023 and the work program for 2023. The present document is made available for consideration by the Forty-Seventh Session of the IGC, as a working document under Agenda Item 6.

2. The text “The Protection of Traditional Knowledge: Draft Articles – Facilitators’ Rev.”, as developed during the Forty-Seventh Session of the Committee, is annexed to the present document.

3. *The Committee is invited to review the document contained in the Annex, in accordance with its 2022-2023 mandate, its work program for 2023 and the decision on Agenda Item 5 during its Forty-Seventh Session referred to above.*

[Annex follows]



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

**Facilitators' Rev. (June 7, 2023)**

## PREAMBLE/INTRODUCTION

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

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

[ARTICLE 1  
USE OF TERMS

For the purposes of this instrument:

**[Misappropriation]** means

[Alt 1

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

[Alt 2

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

[Alt 3

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

[Alt 4

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

[Facilitators' Alt

Any access or use of traditional knowledge of indigenous peoples or local communities without their free, prior and informed consent and mutually agreed terms, or inconsistent with their established codes and practices.]

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

**[Protected traditional knowledge]** is substantive traditional knowledge that is distinctively associated with the cultural heritage of [beneficiaries as defined in Article 4] indigenous [peoples] and local communities, and is created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has been

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

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

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

**Traditional Knowledge** refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that is dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.

[Alt 1

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

[Alt 2

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

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

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

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

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

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

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

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

Facilitators' Alt

**[[“Use”]/[“utilization”] means**

- (a) where the [protected] traditional knowledge is included in a product, or where a product has been developed or obtained on the basis of [protected] traditional knowledge, the manufacturing, importing, offering for sale, selling, stocking or exploiting the product.
- (b) where the [protected] traditional knowledge is included in a process [or] where a process has been developed or obtained on the basis of [protected] traditional knowledge: exploiting of the process; or carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process;
- (c) where the [protected] traditional knowledge is included as part of commercial or non-commercial research and development.]

**Customary Laws** for the purposes of this instrument includes the written or oral laws, Indigenous legal traditions, systems, codes, statutes, ordinances, rules, practices and protocols as applied in a collective context by Indigenous [Peoples], local communities, or other beneficiaries.

[ARTICLE 2  
OBJECTIVES

Facilitators' Alternative

The objectives of this instrument are to:

- (a) Provide effective and adequate protection of traditional knowledge;
- (b) Prevent the erroneous grant of intellectual property rights over traditional knowledge;  
and
- (c) [Recognize Indigenous [Peoples] and local communities as holders of traditional knowledge].

[Alt 1

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- (a) unauthorized<sup>1</sup> and/or uncompensated<sup>2</sup> uses of traditional knowledge; and
- (b) the erroneous grant of intellectual property rights over traditional knowledge,

[while supporting the appropriate use of traditional knowledge].]

[Alt 2

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

[Alt 3

The objective of this instrument is to support the appropriate use of traditional knowledge within the patent system, in accordance with national law, respecting the values of traditional knowledge holders, by:

- (a) contributing toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations;
- (b) recognizing the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain; and

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<sup>1</sup> Unauthorized uses comprise inter alia misappropriation, misuse and unlawful uses of traditional knowledge.

<sup>2</sup> Uncompensated uses include the failure to provide monetary or non-monetary benefits.

(c) preventing the erroneous grant of patent rights over non-secret traditional knowledge.]]



[ARTICLE 3

[PROTECTION CRITERIA/ELIGIBILITY CRITERIA]

Facilitators' Alternative

3.1 Protection shall be extended under this instrument to traditional knowledge, which is:

- (a) created, generated, received by, or revealed to, indigenous [peoples], local communities and developed, held, used, and maintained in a collective context by them [in accordance with their customary laws];
- (b) linked with, and/or is an integral part of, the cultural and social identity and traditional heritage of indigenous peoples, local communities; and
- (c) transmitted within a generation or from generation to generation, whether consecutively or not.

[3.2 A Member State/Contracting party may, under its national law, specify additional criteria for protection for traditional knowledge.]

[Alt 1

3.1. Subject to Article 3.2, protection shall be extended under this instrument to traditional knowledge, which is:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, and is an integral part of, the cultural and social identity and traditional heritage of indigenous peoples, local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not.

3.2 A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional knowledge for a reasonable term as determined by the Member State/Contracting Party.]

[Alt 2

Protection should be extended under this instrument to traditional knowledge which is:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, is an integral part of, and is distinctively associated with, the cultural identity and traditional heritage of indigenous peoples, local communities and/or [other beneficiaries]; and
- (c) [may be] transmitted between or from generation to generation, whether consecutively or not for a term not less than fifty years or five generations.]

[3.2 A Member State/Contracting Party may, under its national law, recognize protection for other beneficiaries who have created relevant subject matter.]

[Alternative ARTICLE 3

[SUBJECT MATTER OF THE INSTRUMENT]

This instrument applies to patents and traditional knowledge, that is:

- (a) distinctively associated with the cultural heritage of beneficiaries as defined in Article 4;  
and
- (b) created/generated, developed, maintained and shared collectively, as well as transmitted from generation to generation for a term as has been determined by each Member State, but not less than 50 years or a period of five generations.]

[ARTICLE 4  
BENEFICIARIES

[Alt 1

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

Facilitators' Alternative

4.1 The beneficiaries under this instrument are Indigenous [Peoples] and local communities.

4.2 A Member State/Contracting Party, where applicable may under national law specify other beneficiaries who create traditional knowledge.]

[ARTICLE 5

SCOPE [AND CONDITIONS] OF PROTECTION

[Facilitators' Alternative

Member States/Contracting Parties [shall/should] take legislative, administrative and/or policy measures, to safeguard the economic and moral interests of the beneficiaries concerning their traditional knowledge, in a reasonable and balanced manner, and to provide that:

- (a) Where, with reference to customary laws of Indigenous [Peoples], local communities or other beneficiaries, access to traditional knowledge is restricted , including where the traditional knowledge is secret or sacred, beneficiaries have exclusive collective rights:
  - (i) to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge;
  - (ii) to receive a fair and equitable share of benefits arising from their use;
  - (iii) of attribution; and
  - (iv) to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- (b) Where, with reference to customary laws of Indigenous [Peoples], local communities or other beneficiaries access to the traditional knowledge is not restricted, beneficiaries have collective rights:
  - (i) to receive a fair and equitable share of benefits arising from its use;
  - (ii) of attribution;
  - (iii) to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- (c) Member States/Contracting parties [shall/should] provide mechanisms for Indigenous [Peoples], local communities or other beneficiaries to seek the protections set out under paragraph 5(a) or (b) in cases where they believe their traditional knowledge is being used without their free, prior and informed consent
- (d) Additionally, and where appropriate in the interest of beneficiaries, Member States/Contracting Parties [shall/should] further support protection of traditional knowledge by providing equitable access to the existing intellectual property system and facilitating consultation and consent from Indigenous [Peoples] and local communities by third parties seeking to use their traditional knowledge.

[Alt 1

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

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

[Alt 2

5.1 Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, with the aim of ensuring that:

(a) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional knowledge is restricted, including where the traditional knowledge is secret or sacred:

(i) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use.

(ii) Beneficiaries have the right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.

(b) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, the traditional knowledge is no longer under the exclusive control of beneficiaries, but is still distinctively associated with the beneficiaries' cultural identity:

(i) Beneficiaries receive a fair and equitable share of benefits arising from its use; and

(ii) Beneficiaries have the right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.

5.2 [For traditional knowledge that is being utilized without the prior informed consent and/or not in accord with customary laws and practices of indigenous [peoples] and local communities, indigenous [peoples] and local communities [or other beneficiaries], as applicable, shall have the possibility to request from the relevant national authorities protection provided for in paragraph 5.1(a), taking into account all relevant circumstances, such as: historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized utilization.]]

[Alt 3

Where traditional knowledge is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has been determined by each Member State, but not less than for 50 years or a period of five generations, traditional knowledge should be protected according to the scope and conditions defined below:

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

(a) Beneficiaries that directly communicate traditional knowledge to users, have the possibility under national law to maintain, control, use, develop, authorize or prevent access to and use/utilization of their protected traditional knowledge; and receive a fair and equitable share of benefits arising from its use by said users.

(b) Users identify clearly discernible holders of said protected traditional knowledge and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries.

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

(a) Beneficiaries that directly communicate protected traditional knowledge to users receive a fair and equitable share of benefits arising from its use by said users; and

(b) Users identify clearly-discernable holders of the protected traditional knowledge when using said traditional knowledge, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries.

5.3 Member States should use best endeavors to archive and preserve traditional knowledge that is widely diffused.]]

[ARTICLE 5BIS

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

Database Protection

[Recognizing the importance of cooperation and consultation] Member States should endeavor to cooperate and consult with Indigenous Peoples and Local Communities [in determining access] [to traditional knowledge], [Member States should endeavor to], subject to and consistent with national [and customary] law, [facilitate and encourage the development of] [the following] [national traditional knowledge databases to which beneficiaries may voluntarily contribute their traditional knowledge] as follows:

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

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

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

[Complementary][Defensive] Protection

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

- (a) facilitate/encourage the development of [publicly accessible] national traditional knowledge databases for the defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation;
- (b) [facilitate/encourage, as appropriate, the creation, exchange and dissemination of, and access to, [publicly accessible] databases of genetic resources and traditional knowledge associated with genetic resources;]
- (c) [provide opposition measures that will allow third parties to dispute the validity of a patent [by submitting prior art];]
- (d) encourage the development and use of voluntary codes of conduct;
- (e) [discourage information lawfully within the beneficiaries' control from being disclosed, acquired by or used by others without the beneficiaries' [consent], in a manner contrary to fair commercial practices, so long as it is [secret], that reasonable steps have been taken to prevent unauthorized disclosure, and has value;]

- (f) [consider the establishment of [publicly accessible] databases of traditional knowledge that are accessible to patent offices to avoid the erroneous grant of patents compile and maintain such databases in accordance with national law;
- (i) there should be minimum standards to harmonize the structure and content of such databases;
  - (ii) the content of the databases should be:
    - a. languages that can be understood by patent examiners;
    - b. written and oral information regarding traditional knowledge;
    - c. relevant written and oral prior art related to traditional knowledge.]
- (g) [develop appropriate and adequate guidelines for the purpose of conducting search and examination of patent applications relating to traditional knowledge by patent offices;]

5BIS.5 [In order to document how and where traditional knowledge is practiced, and to preserve and maintain such knowledge, efforts [should]/[shall] be made by national authorities to codify the oral information related to traditional knowledge and to develop [publicly accessible] databases of traditional knowledge.]] in consultation with Indigenous Peoples and Local Communities that hold this information.

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

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

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

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

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



[ARTICLE 6

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

[Alt 1

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

[Alt 2

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

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

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

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

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

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

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

[ARTICLE 7

DISCLOSURE REQUIREMENT

[Alt 1

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

[Alt 2

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

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

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

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

[Alt 3

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

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

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

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

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

[Alt 4

[NO DISCLOSURE REQUIREMENT

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

[ARTICLE 8

ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]

[Alt 1

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

[Alt 2

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

[Alt 3

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

[ARTICLE 9  
EXCEPTIONS AND LIMITATIONS

[Facilitators' Alternative

9.1 Member States/Contracting Parties may adopt appropriate exceptions and limitations, in consultation with the beneficiaries where applicable, provided that they do not unreasonably prejudice the legitimate interests of the beneficiaries, taking account of the legitimate interests of third parties.

9.2 Any exceptions or limitations adopted by Member States/Contracting Parties should not conflict with the use under customary laws, of traditional knowledge by the beneficiaries.]

9.3 Member States/Contracting Parties should take steps to ensure that the views of Indigenous Peoples and local communities guide the development of any exceptions and limitations they adopt.

[Alt 1

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

[Alt 2

General Exceptions

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

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

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

## Specific Exceptions

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

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

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

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

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

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

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

9.6 [[Protected] traditional knowledge shall not be deemed to have been misappropriated or misused if:

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

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

[ARTICLE 10

TERM OF PROTECTION/RIGHTS

[Facilitators' Alt

The protection of traditional knowledge under this instrument shall apply as long as the traditional knowledge continues to satisfy the criteria of eligibility for protection under Article 3 of this instrument.]

Alt 1

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



[ARTICLE 11  
FORMALITIES

[Facilitators' Alt

Without prejudice to the maintenance of registers or other records of traditional knowledge to facilitate protection where applicable, adherence to formalities by indigenous peoples and local communities shall not be a precondition for protection of traditional knowledge under this instrument].

[Alt 1

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

[Alt 2

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

[Alt 3

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

[ARTICLE 12

TRANSITIONAL MEASURES

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

*[Optional addition*

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

*[Alternative*

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

*[Alternative*

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

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

[ARTICLE 13

RELATIONSHIP WITH OTHER INTERNATIONAL [AGREEMENTS

[Facilitators' Alt

13.1 Member States/Contracting Parties shall implement this instrument in a mutually supportive manner consistent with their obligations in other relevant international instruments to which they are a party.

13.2 Member States/Contracting Parties shall implement this instrument in a manner supportive of the United Nations Declaration on the Rights of Indigenous Peoples.]

Alt 1

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

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

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

ARTICLE 14  
NON-DEROGATION

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

[ARTICLE 15  
NATIONAL TREATMENT

[Facilitators' Alt

The same rights and benefits recognized in relation to traditional knowledge by a Member State/Contracting Party for beneficiaries who are its nationals shall be extended to foreign beneficiaries in its territory.]

Alt. 1

[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.]

Alt. 2

[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]*

Alt. 3

[Each [Member State]/[Contracting Party] [should]/[shall] in respect of traditional knowledge that fulfills the criteria set out in Article 3, accord within its territory to beneficiaries of protection as defined in Article 4, whose members primarily are nationals of or are domiciled in the territory of, any of the other [Member States]/[Contracting Parties], the same treatment that it accords to its national beneficiaries.]

*[End of alternative]*

[ARTICLE 16

TRANSBOUNDARY COOPERATION

[Facilitators' Alt

Where the same traditional knowledge is found within the territory of more than one Member State/Contracting Party, those Member States/Contracting Parties shall endeavor to cooperate, with the involvement of the Indigenous [Peoples] and local communities concerned, as appropriate, with a view to implementing the objectives of this instrument.]

Alt. 1

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

[Facilitators' Draft

ARTICLE 17

REVIEW

Member States/Contracting Parties will undertake a review of this instrument, no later than four years after the entry into force of the instrument.]

[Document WIPO/GRTKF/IC/47/15  
follows]

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

**Forty-Seventh Session**  
**Geneva, June 5 to 9, 2023**

### **THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES**

*Document prepared by the Secretariat*

1. At the Forty-Seventh Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”), which is taking place from June 5 to 9, 2023, the Committee developed, on the basis of document WIPO/GRTKF/IC/47/5, a further text, “The Protection of Traditional Cultural Expressions: Draft Articles – Facilitators’ Rev.”. The Committee decided that this text, as at the close of Agenda Item 5, on June 7, 2023, be considered by the Committee under Agenda Item 6 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee’s mandate for 2022-2023 and the work program for 2023. The present document is made available for consideration by the Forty-Seventh Session of the IGC, as a working document under Agenda Item 6.

2. The text “The Protection of Traditional Cultural Expressions: Draft Articles – Facilitators’ Rev.”, as developed during the Forty-Seventh Session of the Committee, is annexed to the present document.

3. *The Committee is invited to review the document contained in the Annex, in accordance with its 2022-2023 mandate, its work program for 2023 and the decision on Agenda Item 5 during its Forty-Seventh Session referred to above.*

[Annex follows]



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

**Facilitators' Rev. (June 7, 2023)**

## PREAMBLE/INTRODUCTION

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

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

[ARTICLE 1  
USE OF TERMS

For the purposes of this instrument:

**Traditional Cultural Expressions** are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and [may be]/[is] dynamic and evolving and comprise verbal forms<sup>1</sup>, musical forms<sup>2</sup>, expressions by movement<sup>3</sup>, tangible<sup>4</sup> or intangible forms of expression, or combinations thereof.

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

[ALT

**Publicly available** means traditional cultural expressions that are used outside of the practices of indigenous peoples and local communities in which they originated, notwithstanding that their historic origin may be known to the public.]

**[[“Use”]/[“Utilization”]** means

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

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<sup>1</sup> [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

<sup>2</sup> [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

<sup>3</sup> [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

<sup>4</sup> [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

Facilitators' Alt

**[[“Use”]/[“utilization”]** means

- (a) where the traditional cultural expression is included in a product, or where a product has been developed or obtained on the basis of a traditional cultural expression, the manufacturing, importing, offering for sale, selling, stocking or exploiting the product.
- (b) where the traditional cultural expression is included in a process [or] where a process has been developed or obtained on the basis of a traditional cultural expression: exploiting of the process; or carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process;
- (c) where the traditional cultural expression is included as part of commercial or non-commercial research and development.

**Customary Laws** for the purposes of this instrument includes the written or oral laws, Indigenous legal traditions, systems, codes, statutes, ordinances, rules, practices and protocols as applied in a collective context by Indigenous [Peoples], local communities, or other beneficiaries.

[ARTICLE 2  
OBJECTIVES

Facilitators' Alternative

The objectives of this instrument are to:

- (a) Provide effective and adequate protection of traditional cultural expressions;
- (b) Prevent the erroneous grant of intellectual property rights over traditional cultural expressions; and
- (c) [Recognize Indigenous [Peoples] and local communities as holders of traditional cultural expressions].

[Alt 1

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- (a) unauthorized<sup>5</sup> and/or uncompensated<sup>6</sup> uses of traditional cultural expressions; and
- (b) the erroneous grant of intellectual property rights over traditional cultural expressions,

[while supporting the appropriate use of traditional cultural expressions].]

[Alt 2

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

[Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, respecting the interests of indigenous peoples and local communities to:

- (a) prevent the misappropriation, misuse, and unauthorized use of their traditional cultural expressions[, while making the most of the existing intellectual property system];

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<sup>5</sup> Unauthorized uses comprise inter alia misappropriation, misuse and unlawful uses of traditional cultural expressions.

<sup>6</sup> Uncompensated uses include the failure to provide monetary or non-monetary benefits.

(b) encourage and protect creation and innovation, whether or not commercialized, recognizing the value of public domain and the need to protect, preserve and enhance the public domain; and

(c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.

(d) promote the appropriate use of traditional cultural expression for sustainable, community-based development where so desired by indigenous peoples and local communities.]]

[ARTICLE 3

PROTECTION CRITERIA/ELIGIBILITY CRITERIA

Facilitators' Alternative

3.1 Protection shall be extended under this instrument to traditional cultural expressions, which are:

- (a) created, generated, received by, or revealed to, Indigenous [Peoples], local communities and developed, held, used, and maintained in a collective context by them [in accordance with their customary laws];
- (b) linked with, and/or is an integral part of, the cultural and social identity and traditional heritage of indigenous peoples, local communities; and
- (c) transmitted within a generation or from generation to generation, whether consecutively or not.

[3.2 A Member State/Contracting Party may, under its national law, specify additional criteria for protection for traditional cultural expressions.]

[Alt 1

3.1 Subject to Article 3.2, protection shall be extended under this instrument to traditional cultural expressions which are:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not.

3.2. A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional cultural expressions for a reasonable term as determined by the Member State/Contracting Party.]

[Alt 2

3.1 Protection should be extended under this instrument to traditional cultural expressions which are:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];



- (b) linked with, are an integral part of, and are distinctively associated with the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not for a term not less than fifty years or five generations.]]

[ARTICLE 4  
BENEFICIARIES

[Alt 1

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

Facilitators' Alternative

4.1 The beneficiaries under this instrument are Indigenous [Peoples] and local communities

4.2 A Member State/Contracting Party, where applicable may under national law specify other beneficiaries who create traditional cultural expressions.]

[ARTICLE 5

SCOPE OF [PROTECTION]/[SAFEGUARDING]

[Facilitators' Alternative

Member States/Contracting Parties [shall/should] take legislative, administrative and/or policy measures, to safeguard the economic and moral interests of the beneficiaries concerning their traditional cultural expressions, in a reasonable and balanced manner, and to provide that:

- (a) Where, with reference to the customary laws of Indigenous [Peoples], local communities, or other beneficiaries, access to traditional cultural expressions is restricted, including where the traditional cultural expressions are secret or sacred, beneficiaries have exclusive collective rights:
  - (i) to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional cultural expressions;
  - (ii) to receive a fair and equitable share of benefits arising from their use;
  - (iii) of attribution; and
  - (iv) to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- (b) Where, with reference to the customary laws of Indigenous [Peoples], local communities or other beneficiaries, access to the traditional cultural expressions is not restricted, beneficiaries have collective rights :
  - (i) to receive a fair and equitable share of benefits arising from its use;
  - (ii) of attribution; and
  - (iii) to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- (c) Member States/Contracting parties [shall/should] provide mechanisms for Indigenous [Peoples], local communities or other beneficiaries to seek the protections set out under paragraph 5(a) or (b) in cases where they believe their traditional cultural expressions are being used without their free, prior, and informed consent.
- (d) Additionally, and where appropriate in the interest of beneficiaries, Member States/Contracting Parties [shall/should] further support protection of traditional cultural expressions by providing equitable access to the existing intellectual property system and facilitating consultation and consent from Indigenous [Peoples] and local communities by third parties seeking to use their traditional cultural expressions.

[Alt 1

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, [taking into consideration exceptions and limitations, as defined in Article 7,] in a reasonable and balanced manner.

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

[Alt 2

5.1 Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, with the aim of ensuring that:

(c) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional cultural expressions is restricted, including where the traditional cultural expressions are secret or sacred:

(iii) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional cultural expressions; and receive a fair and equitable share of benefits arising from their use.

(iv) Beneficiaries have the moral right of attribution and the moral right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.

(d) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, the traditional cultural expressions are no longer under the exclusive control of beneficiaries, but are still distinctively associated with the beneficiaries' cultural identity:

(iii) Beneficiaries receive a fair and equitable share of benefits arising from their use; and

(iv) Beneficiaries have the moral right of attribution and the right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.

5.2 [For traditional cultural expressions that are being utilized without the prior informed consent and/or not in accord with customary laws and practices of indigenous [peoples] and local communities, indigenous [peoples] and local communities or other beneficiaries, as applicable, shall have the possibility to request from the relevant national authorities protection provided for in paragraph 5.1(a), taking into account all relevant circumstances, such as: historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized utilization.]]

[Alt 3

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

- (a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:
  - i. [create,] maintain, control and develop said [protected] traditional cultural expressions;
  - ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret [protected] traditional cultural expressions;
  - iii. [authorize or deny the access to and use/[utilization] of said [protected] traditional cultural expressions based on free, prior and informed consent or approval and involvement and mutually agreed terms;]
  - iv. protect against any [false or misleading] uses of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
  - v. [prevent] prohibit use or modification which distorts or mutilates a [protected] traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.
- (b) encourage users [to]:
  - i. attribute said [protected] traditional cultural expressions to the beneficiaries;
  - ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions]; and
  - iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions.

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

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

nature of the moral rights associated with the [protected] traditional cultural expressions[; and][.]]

(d) [refrain from any [false or misleading uses] of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

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

(a) attribute said [protected] traditional cultural expressions to the beneficiaries;

(b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions;

(c) [protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[;]] [and]

(d) where applicable, deposit any user fee into the fund constituted by such Member State.]]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

[Alt 1

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

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

[Alt 2

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

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

[ARTICLE 7  
EXCEPTIONS AND LIMITATIONS

[Facilitators' Alt

7.1 Member States/Contracting Parties may adopt appropriate exceptions and limitations, in consultation with the beneficiaries where applicable, provided that they do not unreasonably prejudice the legitimate interests of the beneficiaries, taking account of the legitimate interests of third parties.

7.2 Any exceptions or limitations adopted by Member States/Contracting Parties should not conflict with the use under customary laws, of traditional cultural expressions by the beneficiaries.]

7.3 Member States/Contracting Parties should take steps to ensure that the views of Indigenous Peoples and local communities guide the development of any exceptions and limitations they adopt.

[Alt 1

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

[Alt 2

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

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.

2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:

- (a) learning teaching and research;
- (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
- (c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.

3. A Member State may provide for exceptions and limitations [other than] [in addition to] those permitted under paragraph (2).



4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a [protected] traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.]

[Alt 3

#### General Exceptions

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

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

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

#### Specific Exceptions

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

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

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]

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

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

(b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

(c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]

(d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]]

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

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

[Facilitators' Alt

The protection of a traditional cultural expression under this instrument shall apply as long as the traditional cultural expression continues to satisfy the criteria of eligibility for protection under Article 3 of this instrument.]

*[Option 1*

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

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

*[Option 2*

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

*[Option 3*

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

[ARTICLE 9]  
FORMALITIES

[Facilitators' Alt

Without prejudice to the maintenance of registers or other records of traditional cultural expressions to facilitate protection where applicable, adherence to formalities by indigenous peoples and local communities shall not be a precondition for protection of traditional cultural expressions under this instrument.]

*[Option 1*

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

*[Option 2*

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

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

[ARTICLE 10

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

[Alt 1

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

[Alt 2

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

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

[Alt 3

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

[Alt 4

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

[ARTICLE 11]

[TRANSITIONAL MEASURES

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

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

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

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

## [ARTICLE 12]

## [RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS]

[Facilitators' Alt

12.1 Member States/Contracting Parties shall implement this instrument in a mutually supportive manner consistent with their obligations in other relevant international instruments to which they are a party.

12.2 Member States/Contracting Parties shall implement this instrument in a manner supportive of the United Nations Declaration on the Rights of Indigenous Peoples.]

Alt 1

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

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

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

[ARTICLE 13]

[NATIONAL TREATMENT

[Facilitators' Alt

The same rights and benefits recognized in relation to traditional cultural expressions by a Member State/Contracting Party for beneficiaries who are its nationals shall be extended to foreign beneficiaries in its territory.]

Alt 1

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



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

[ARTICLE 14]

[TRANSBOUNDARY COOPERATION

[Facilitators' Alt

Where the same traditional cultural expression is found within the territory of more than one Member State/Contracting Party, those Member States/Contracting Parties shall endeavor to cooperate, with the involvement of the Indigenous [Peoples] and local communities concerned, as appropriate, with a view to implementing the objectives of this instrument.]

Alt 1

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

## ARTICLE 15

### [CAPACITY BUILDING AND AWARENESS RAISING

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

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

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

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

[Facilitators' Draft

ARTICLE 16

REVIEW

Member States/Contracting Parties will undertake a review of this instrument, no later than four years after the entry into force of the instrument.]

[End of Annexes and of document]