

Date: April 20, 2012

The Protection of Traditional Knowledge: Draft Articles

Chairman's Note

This text represents the results, at the conclusion of the IGC's 21st Session, in accordance with the mandate of the WIPO General Assemblies (contained in WO/GA/40/7). It represents a work in progress and is without prejudice to the positions of the participants.

Notes

- The method used by facilitators was to merge options where possible, and explicitly identify elements of convergence and divergence.
- Some of the articles are merged into one option which includes elements of divergence; in those cases, elements of divergence are in **[bold, in square brackets]**. Those can be considered to be the main policy issues. Other issues (should/shall) are in [regular text in square brackets].
- New language added by delegations during the current session is underlined; the fact that any new language is not square-bracketed does not necessarily indicate that it represents an element of convergence.
- Square brackets that were present in WIPO/GRTKF/IC/21/4 were not removed.
- Series of terms separated by slashes (for example, [holders]/[owners]) indicate that either of those terms is supported generally by at least one delegation and/or that the choice of terms is a matter of terminology, or depends on the type of instrument or on outstanding policy issues being resolved.
- The facilitators suggest that the Plenary consider how to address these and other drafting issues ([may]/[should]/[shall], [intend]/[undertake]/[endeavor], [Member States]/[Contracting Parties], [holders]/[owners]), and the use of the active voice as opposed to the passive voice.
- The facilitators did not work on the objectives and principles for this revision due to a lack of time.

Additional Observations

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

Summary of Changes from Rev. 1

- This revision (Rev. 2) includes the following changes from Rev. 1 (version of as April 18, 2:15 pm):
 - The sections on objectives and principles now reflect the current session's Plenary discussions
 - Elements that the facilitators had inadvertently omitted from Rev. 1 are now included; this includes new language as Article 3 bis, Article 4 bis, as well as in Articles 5 and 12, in addition to changing "indigenous and local communities" to "indigenous peoples and local communities" where this had not yet been done
 - Facilitators have systematically replaced iterations of "should" or "shall" with "[should]/[shall]"; "Member State" or "Contracting Party" with "[Member State]/[Contracting Party]"; and "holders" or "owners" with "[holders]/[owners]" to indicate that the issues behind those terms are still outstanding
 - Facilitators have added two comments comparing the traditional knowledge text's article on the subject matter of protection to that of the traditional cultural expressions text

POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize value

(i) *recognize the [holistic] [distinctive] nature of traditional knowledge and its intrinsic value, including its social, spiritual, [economic],¹ intellectual, scientific, ecological, technological, [commercial],² educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are [fundamentally] intrinsically important for indigenous peoples and local communities and have equal scientific value as other knowledge systems;*

Promote respect

(ii) *promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge [holders]/[owners] who conserve, develop and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge [holders]/[owners]; and for the contribution which traditional knowledge [holders]/[owners] have made to the [conservation of the environment]³ conservation and sustainable use of biodiversity, to food security and sustainable agriculture, and to the progress of science and technology;*

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

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

Promote [conservation and] preservation of traditional knowledge

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

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

(v) *be undertaken in a manner that empowers traditional knowledge [holders]/[owners] to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet*

¹ A delegation has requested that the square brackets around this word ("economic") be removed.

² A delegation has requested that the square brackets around this word ("commercial") be removed.

³ A delegation has requested that the square brackets around this phrase ("conservation of the environment") be removed.

the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misuse and misappropriation, and should effectively empower associated traditional knowledge [holders]/[owners] to exercise due rights and authority over their own knowledge;

Alternative

Promote the conservation of traditional knowledge

(iv bis) promote the conservation and the preservation of traditional knowledge and support traditional knowledge systems;

[End of alternative]

Support traditional knowledge systems

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

Contribute to safeguarding traditional knowledge

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

[Repress] Prevent [unfair and inequitable uses]⁵ misappropriation and misuse

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

Alternative⁶

Promote community development

(xiv) Promote community development through the supporting of traditional knowledge systems and the prevention of misappropriation.

⁴ A delegation has noted that the analogous word ("asociado") is missing from the Spanish language version.

⁵ A delegation has requested that the square brackets around this phrase ("unfair and inequitable uses") be removed.

⁶ This merges subobjectives (vi) and (vii) of Objective (xvi) to create a new Objective.

[End of alternative]

Respect for and cooperation with relevant international agreements and processes

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

Promote innovation and creativity

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

Alternative

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

[End of alternative]

Ensure prior informed consent and exchanges based on mutually agreed terms

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

[Promote mandatory disclosure requirement]

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

Promote equitable benefit sharing

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

Promote community development and legitimate trading activities

- (xiii) [if so desired] where requested by the [holders]/[owners] of traditional knowledge, promote the use of traditional knowledge for community based

development, recognizing the rights of [traditional] indigenous peoples⁷ and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge [holders]/[owners] and custodians seek such development and opportunities consistent with their right to freely pursue economic development;

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

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

Alternative

(xiv) *[[curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring each [Member States]/[Contracting Parties] [could]/[to] consider, with the prior informed consent of its indigenous peoples⁸ and local communities, the creation of digital libraries of publicly-known traditional knowledge and associated genetic resources];*

[End of alternative]

Enhance transparency and mutual confidence

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

Complement protection of traditional cultural expressions

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

[Utilization of traditional knowledge by third parties

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

[Promote access to knowledge and safeguard the public domain

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

Alternative

⁷ The facilitators inserted the word "peoples" in square brackets following the insertion by a delegation of the word "indigenous" for terminological consistency.

⁸ The facilitators inserted the word "peoples" in square brackets following the insertion by a delegation of the word "indigenous" for terminological consistency.

- (i) recognize the *[holistic] [distinctive]* nature of traditional knowledge, including its social, spiritual, economic, intellectual, educational and cultural importance;
- (ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems;
- (iii) meet the actual needs of [holders]/[owners] and users of traditional knowledge taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration;
- (iv) promote and support conservation, application and preservation of traditional knowledge;
- (v) support traditional knowledge systems;
- (vi) *[repress]* prevent *[unfair and inequitable uses]* illicit appropriation of traditional knowledge;
- (vii) operate consistently with relevant international agreements and instruments *[and processes];*
- (viii) promote the fair and equitable sharing of benefits arising from the use of traditional knowledge;
- (ix) enhance transparency and mutual confidence in relations between traditional knowledge *[holders]/[owners]* on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct *[and the principles of free and prior informed consent];*

[End of alternative]

GENERAL GUIDING PRINCIPLES

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

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

Alternative

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

[End of alternative]

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

Alternative

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

[End of alternative]

- (c) Principle of effectiveness and accessibility of protection
- (d) Principle of flexibility and comprehensiveness
- (e) Principle of equity and benefit sharing

Alternative

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

[End of alternative]

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

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

Alternative

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

Alternative

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

[End of alternative]

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

Alternative

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

[End of alternative]

Alternative

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

[End of alternative]

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

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

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

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

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

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

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

ARTICLE 1

SUBJECT MATTER OF PROTECTION

DEFINITION OF TRADITIONAL KNOWLEDGE

Facilitators' Option (Convergent Text)

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

Optional Additions to the Facilitators' Text

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

Alternative

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

COMMENTS BY THE FACILITATORS ON ARTICLE 1 (DEFINITION OF TRADITIONAL KNOWLEDGE)

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

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

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

CRITERIA FOR ELIGIBILITY

Facilitators' Option (Convergent Text)

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

OPTIONAL ADDITIONS TO THE FACILITATORS' OPTION

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

COMMENTS BY THE FACILITATORS ON ARTICLE 1 (CRITERIA FOR ELIGIBILITY)

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

ARTICLE 2

BENEFICIARIES OF PROTECTION

Facilitators' Option (Convergent Text)

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

Optional Additions to the Facilitators' Text

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

Alternative

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

COMMENTARY BY THE FACILITATORS ON ARTICLE 2

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

ARTICLE 3

SCOPE OF PROTECTION

Option 1

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

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

Option 2

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

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

informed consent and benefit sharing requirements; in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.]

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

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

COMMENTS BY THE FACILITATORS ON ARTICLE 3

Elements of convergence

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

Elements of divergence

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

Other observations

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

ARTICLE 3 BIS

SCOPE OF PROTECTION AND SANCTIONS

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

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

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

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

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

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

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

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

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

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

Optional addition

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

Optional addition

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

Optional addition

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

Optional addition

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

Alternative

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

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

[End of alternative]

COMMENTS BY THE FACILITATORS ON ARTICLE 4

Elements of convergence

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

Elements of divergence

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

Other observations

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

ARTICLE 4 BIS

DISCLOSURE REQUIREMENT

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

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

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

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

Alternative

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

[End of alternative]

ARTICLE 5

ADMINISTRATION [OF RIGHTS]

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

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

Alternative

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

mutually agreed terms as under Article 3. This information may be supplied by any of the parties involved in the agreement.

[End of alternative]

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

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

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

COMMENTS BY THE FACILITATORS ON ARTICLE 5

Elements of convergence

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

Elements of divergence

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

Other observations

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

ARTICLE 5 BIS

APPLICATION OF COLLECTIVE RIGHTS

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

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

5.2 The nature of the national or regional authority or authorities, created with the participation of indigenous peoples, [should]/[shall] be communicated to the Secretariat of the World Intellectual Property Organization.]⁹

⁹ Unofficial translation by the facilitators from original Spanish-language text.

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

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

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

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

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

Alternative

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

Alternative

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

- (a) teaching, learning, but does not include research resulting in profit-marking or commercial purposes;
- (b) for preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, taking account of the legitimate interests of third parties.

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

[End of alternative]

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

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

- (a) the use of traditional knowledge in cultural institutions recognized under the appropriate national law, archives, libraries, museums for non-commercial cultural

heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted; and

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

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

Alternative

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

[End of alternative]

(a) has been independently created;

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

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

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

(a) obtained from a printed publication;

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

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

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

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

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

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

COMMENTS BY THE FACILITATORS ON ARTICLE 6

Elements of convergence

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

Elements of divergence

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

ARTICLE 7

TERM OF PROTECTION

Option 1

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

Optional additions to Option 1

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

Option 2

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

COMMENTS BY THE FACILITATORS ON ARTICLE 7

Elements of divergence

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

Additional observations

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

ARTICLE 8

FORMALITIES

Option 1

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

Option 2

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

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

Alternative

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

COMMENTS BY THE FACILITATORS ON ARTICLE 8

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

ARTICLE 9

TRANSITIONAL MEASURES

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

Optional addition

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

Alternative

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

Alternative

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

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

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

Optional additions

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

COMMENTS BY THE FACILITATORS ON ARTICLE 10

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

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS¹⁰

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

Alternative

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

[End of alternative]

Alternative

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

[End of alternative]

¹⁰ The facilitators have removed language formerly found under this Article and which read as follows:

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

Reciprocity; or

An appropriate means of recognizing foreign rights holders.

ARTICLE 12

TRANS-BOUNDARY COOPERATION

Facilitators' Option (Convergent Text)

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

Option 1

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

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

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

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

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

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

Optional addition to either option

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

[End of document]