

TRADITIONAL KNOWLEDGE FACILITATORS' TEXT (April 18, 2:15 pm)

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.
- Square brackets that were present in WIPO/GRTKF/IC/21/4 were not removed.
- The facilitators did not work on the objectives and principles for this revision due to a lack of time.
- The facilitators suggest that the Plenary consider how to address drafting issues (may/should/shall, intend/undertake/endeavor, Member States/Contracting Parties, owners/holders, and the use of the active voice as opposed to the passive voice).

Additional Observations

- Some delegations made proposals for new definitions. Facilitators propose that the Plenary consider whether and how to include those.

THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES

POLICY OBJECTIVES (to be discussed at a later stage)

The protection of traditional knowledge should aim to:

Recognize value

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

Promote respect

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

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

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

Promote conservation and preservation of traditional knowledge

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

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

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

Support traditional knowledge systems

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

Contribute to safeguarding traditional knowledge

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

Repress [unfair and inequitable uses] misappropriation and misuse

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

Respect for and cooperation with relevant international agreements and processes

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

Promote innovation and creativity

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

Ensure prior informed consent and exchanges based on mutually agreed terms

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

Promote equitable benefit sharing

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

Promote community development and legitimate trading activities

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

Preclude the grant of improper IP rights to unauthorized parties

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

Enhance transparency and mutual confidence

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

Complement protection of traditional cultural expressions

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

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

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

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

(iv) promote conservation and preservation of traditional knowledge;

(v) support traditional knowledge systems;

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

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

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

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

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

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

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

ARTICLE 1

SUBJECT MATTER OF PROTECTION

DEFINITION OF TRADITIONAL KNOWLEDGE

1.1 For the purposes of this instrument, "traditional knowledge" **[is knowledge that is dynamic and evolving and]** refers [but is not limited] to know-how, skills, innovations, practices, techniques, teachings and learnings [and processes] **[resulting from intellectual activity]** [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]], are inalienable, indivisible and imprescriptible], **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]** [and which may subsist in codified, oral or other forms], as set out in the criteria for eligibility. [Traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material of indigenous peoples and local communities.]

COMMENTS BY THE FACILITATORS ON ARTICLE 1, PARAGRAPH 1

Elements of convergence

For the purposes of this instrument, "traditional knowledge" refers to know-how, skills, innovations, practices, teachings and learnings [followed by a reference to the development or existence of the traditional knowledge in either the traditional context, an indigenous or local community and/or a multi-generation setting].

Elements of divergence

- (i) [is knowledge that is dynamic and evolving and]
- (ii) [resulting from intellectual activity]
- (iii) , are inalienable, indivisible and imprescriptible
- (iv) [, 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]
- (v) [and which may subsist in codified, oral or other forms]
- (vi) [Traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material of indigenous peoples and local communities.]

Other observations

- 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.

CRITERIA FOR ELIGIBILITY

1.2 Protection extends to traditional knowledge that is:

- (a) **[the unique product of or is distinctively]** associated with beneficiaries as defined in Article 2;
- (b) collectively generated, shared and preserved;
- (c) **[integral]/[linked]** to the cultural identity of beneficiaries as defined in Article 2;
- (d) **[not widely known or used outside the community of the beneficiaries as defined in Article 2, [for a reasonable period of time]]**;
- (e) **[not in the public domain]**;
- (f) **[not protected by an intellectual property right; [and/or]]**
- (g) **[not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known]**.

COMMENTS BY THE FACILITATORS ON ARTICLE 1, PARAGRAPH 2

Elements of convergence

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

Elements of divergence

- (i) [the unique product of or is distinctively] associated to the beneficiaries
- (ii) [integral]/[linked] to the cultural identity of beneficiaries
- (iii) [not widely known or used outside the community of the beneficiaries as defined in Article 2, [for a reasonable period of time]
- (iv) [not in the public domain]
- (v) [not protected by an intellectual property right]
- (vi) [not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known]
- (vii) the issue as to 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 the list)

ARTICLE 2

BENEFICIARIES OF PROTECTION

Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples and local communities, [traditional communities], [families], [nations], [individuals within the categories listed above] [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 determined by national law].

COMMENTARY BY THE FACILITATORS ON ARTICLE 2

Elements of convergence

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

Elements of divergence

- (i) [traditional communities]
- (ii) [families]
- (iii) [nations]
- (iv) [individuals within the categories listed above]
- (v) [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 determined by national law]

Additional observations

- 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 where known unless they decide otherwise;
 - (ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders;
 - (iii) [encourage]/[ensure, where the traditional knowledge] [is secret]/[is not widely known] traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits [arising from the commercial use of that traditional knowledge].

Option 2

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

- (a) enjoy, control, utilize, maintain, develop, preserve and protect their traditional knowledge;
- (b) authorize or deny the access 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, where known;
- (f) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders; 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.]

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 control authorization of 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)

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 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 measures necessary to ensure the application of this instrument.

Option 1

4.2 Member States [should]/[shall] ensure that [accessible, appropriate and adequate] [criminal, civil and 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

4.3 The procedures referred to in paragraph 4.1 should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for holders of traditional knowledge. [They should also provide safeguards for legitimate third party interests and the public interest.]

Optional addition

4.4 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].

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 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 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 applications that concern an invention that relates to or uses traditional knowledge shall include information on the country from which the inventor or the breeder 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.1 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 collected or received the traditional knowledge.

4 BIS.2 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 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 office may reject the application.

4 BIS.3 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.

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.

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

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

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 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.

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 archives, libraries, museums or cultural institutions recognized under the appropriate national law 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:**

- (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

Member States may determine the appropriate term of [p]rotection 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.

COMMENTS BY THE FACILITATORS ON ARTICLE 7

Elements of convergence

- (i) general suitability of basing the term of protection on the continued fulfillment of the criteria for eligibility found in Article 1

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

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.]

ARTICLE 9

TRANSITIONAL MEASURES

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

Option 1

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

Option 2

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

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

Option 1

[10.1 Protection under this instrument [should]/[shall] take account of, and operate consistently with, other international [and regional and national] instruments [and processes] [, 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*].]

Option 2

[10.1 [Protection under this instrument should leave intact] and should in no way affect the rights or the protection provided for in international legal instruments [, in particular 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*].]

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

Alternative

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

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS¹

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

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.

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.

¹ 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

In instances where traditional knowledge is located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] cooperate 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].

Alternative

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.

Alternative

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.

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