

The Protection of Traditional Knowledge: Draft Articles

Rev. 2 (April 25, 10:00 pm)

Facilitators' Notes

This Revision 2 includes changes to the policy objectives and the guiding principles, Articles 1, 2, 3 and 6 as per comments made by Member States both in plenary and in the expert group; all other provisions are unchanged from WIPO/GRTKF/IC/24/4.

Where facilitators have removed text toward simplifying the document, such text has been placed in an Annex at the end of this document.

POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize value

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

Promote awareness and respect

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

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

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

Alternative

- (iii) be guided by the rights and needs of the holders of traditional knowledge and society [?].¹

Promote [conservation and] preservation of traditional knowledge

- (iv) promote and support the [conservation of and] preservation [of] [and respect for] 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 Facilitators would welcome clarification from proponents of this Alternative.

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

Support traditional knowledge systems

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

Contribute to safeguarding traditional knowledge

- (vii) while [recognizing the value of a vibrant public domain], contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary and community practices, norms, laws and understandings of traditional knowledge [holders]/[owners], for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general on the basis of prior informed consent and the mutually agreed terms with the [holders]/[owners] of that knowledge;²

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

- (viii) repress the misappropriation of [protected] [secret] 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 and 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]

² One delegation proposed that paragraph (vii) be combined with paragraphs (iv) or (vi) for simplification.

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;

Alternative

- (xi) promote the use of contractual arrangements between the holders of protected traditional knowledge and those who obtain protected traditional knowledge and those who obtain protected traditional knowledge from such holders in order to [?]³

[Promote mandatory disclosure requirement

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

Alternative

- (xi bis) ensure that traditional knowledge is compiled in databases that are available to patent examiners, except when the traditional knowledge is secret traditional knowledge, and when a holder of secret traditional knowledge makes such knowledge available to another, promote the use of contracts so that the permitted uses and further disclosure of the traditional knowledge is understood by the parties to the contract;

Promote equitable benefit sharing

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

Promote community development and legitimate trading activities

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

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

- (xiv) [curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring [the

³ Facilitators would welcome clarification from proponents of this Alternative.

creation of digital libraries of publicly known traditional knowledge and associated genetic resources], [in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit sharing conditions have been complied with in the country of origin];

Alternative

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

[End of alternative]

Enhance transparency and mutual confidence

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

Complement protection of traditional cultural expressions

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

[Utilization of traditional knowledge by third parties

(xvii) [enable the utilization of] facilitate access to protected traditional knowledge by third parties on mutually agreed terms;

[Promote access to knowledge and safeguard the public domain

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

Document and conserve traditional knowledge

(xix) contribute to the documentation and conservation of traditional knowledge, encouraging traditional knowledge to be disclosed, learned and used in accordance with relevant customary practices, norms, laws, and understandings of traditional knowledge holders, including those customary practices, norms, laws and understandings that require prior informed consent and mutually agreed terms before the traditional knowledge can be disclosed, learned or used by others;

Promote innovation

(xx) the protection of traditional knowledge should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations;

Alternative

- (i) recognize the [holistic] [distinctive] nature of traditional knowledge, including its social, spiritual, economic, intellectual, educational and cultural importance;
- (ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems;
- (iii) meet the actual needs of [holders]/[owners] and users of traditional knowledge taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration;
- (iv) promote and support conservation, application and preservation of traditional knowledge;
- (v) support traditional knowledge systems;

Alternative ((iv) + (v))

Promote the conservation of traditional knowledge

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

[End of alternative]

- (vi) [repress] prevent [unfair and inequitable uses] illicit appropriation of traditional knowledge;
- (vii) operate consistently with relevant international agreements and instruments [and processes];
- (viii) promote the fair and equitable sharing of benefits arising from the use of traditional knowledge;

Alternative ((vi) + (viii))

Promote community development

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

[End of alternative]

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

[End of alternative]

GENERAL GUIDING PRINCIPLES

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

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

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

Alternative

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

[End of alternative]

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

(d) *Principle of flexibility and comprehensiveness*

(e) *Principle of equity and benefit sharing*

Alternative

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

[End of alternative]

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

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

Alternative ((f) + (g))

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

[End of alternative]

Alternative

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

[End of alternative]

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

Alternative

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

[End of alternative]

Alternative

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

[End of alternative]

- (i) *Principle of recognition of the specific characteristics of traditional knowledge*
(j) *Principle of providing assistance to address the needs of traditional knowledge holders*

Alternative ((a) + (j))

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

[End of alternative]

- (k) *[Principle of recognizing that knowledge that is in the public domain is the common heritage of mankind]*
(l) *[Principle of protecting, preserving and expanding the public domain]*
(m) *[Principle of the necessity for new incentives to share knowledge and to minimize restrictions on access]*
(n) *Principle that any monopoly on the right to use certain information should be for a limited time*
(o) *Principle of protecting and supporting the interests of creators*

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Definition of Traditional Knowledge

1.1 For the purposes of this instrument, "traditional knowledge" [refers to]/[includes] know-how, skills, innovations, practices, teachings and learnings of indigenous [peoples] and [local communities] that are dynamic and evolving, and that are intergenerational/and that are passed on from generation to generation, and which may subsist in codified, oral or other forms.

[Traditional knowledge may be associated, in particular, with fields such as agricultural, environmental, healthcare and indigenous and traditional medical knowledge and medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.]

Definition of Traditional Knowledge Associated with Genetic Resources

1.2 [Traditional knowledge associated with genetic resources means [substantive] knowledge of the [properties], and uses of genetic resources held by indigenous [peoples] and local communities [and which directly leads to a claimed invention].]

Criteria for Eligibility

1.3 Protection extends only to traditional knowledge that is [distinctively] associated/linked with the cultural and social identity, [and] or cultural heritage of beneficiaries as defined in Article 2, that is generated, maintained, shared/transmitted in collective context, and has been used for a term as may be determined by each [Member State]/[Contracting Party] but of not less than [fifty years] [recognizing the [cultural] diversity of the beneficiaries].

1.4 [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2, [for a reasonable period of time], in the public domain, protected by an intellectual property right or the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.]

Databases

1.5 Traditional knowledge that is contained in databases may be used to prevent the erroneous grant of patents.

ARTICLE 2

BENEFICIARIES OF PROTECTION

2.1 Beneficiaries of protection are indigenous [peoples], local communities [and nations] [who hold, maintain, use and/or develop] the [protected] traditional knowledge as defined in Article 1.3, [or any other national entity defined by national law.]

2.2 [Where [protected] traditional knowledge as defined in Article 1.3 is not specifically attributable or confined to an indigenous [people] or local community, [or] and it is not possible to identify the [people or] community that generated it, [Member States]/[Contracting Parties] may define [a]/[any] national entity defined by national legislation as a beneficiary.]

Optional addition

2.3 [Beneficiaries of [defensive protection] of [protected] traditional knowledge as defined in Article 1, are indigenous peoples and communities, local communities [as well as society at large].]

ARTICLE 3
SCOPE OF PROTECTION⁴

Option 1

3.1 [Member States]/[Contracting Parties]/[This instrument] [should]/[shall], confer(s) the following [exclusive] collective rights on the beneficiaries, as defined in Article 2 :

- (a) to maintain, control, protect and develop their traditional knowledge;
- (b) to authorize or deny the access to and use/utilization based on prior and informed consent;
- (c) to have a fair and equitable share of benefits arising from the use/utilization of their traditional knowledge in accordance with the terms set out as a condition for the prior and informed consent;
- (d) [to be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications];
- (d^{bis}) [require 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 [In addition to the protection provided for in Paragraph 1, users of traditional knowledge which fulfills the criteria in Article 1.3 [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 cultural norms and practices of the beneficiary.

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

Option 2

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

- (a) discourage the unauthorized disclosure, use or other uses of [secret] [protected] traditional knowledge;
- (b) where [protected] traditional knowledge is knowingly used outside the traditional context:

⁴ While two options are represented here, a number of delegations indicated their belief that these two options are complementary and could be combined into a single option.

- (i) [acknowledge the source of traditional knowledge and attribute its beneficiaries/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 beneficiaries/holders/owners;
- (iii) encourage beneficiaries and users to establish mutually agreed terms;

Alternative

- (iii) ensure that[, 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 in compliance with the right of local communities to decide to grant access to that knowledge or not;
- [(c) facilitate the development of national traditional knowledge databases for the defensive protection of traditional knowledge;
- (d) facilitate, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;
- (e) provide opposition measures that will allow third parties to dispute the validity of a patent by submitting prior art;
- (f) encourage the development and use of voluntary codes of conduct; and
- (g) discourage information lawfully within the beneficiaries'/holders'/owners' control from being disclosed, acquired by or used by others without the beneficiaries'/holders'/owners' [consent], in a manner contrary to fair commercial practices, so long as it is secret, that reasonable steps have been taken to prevent unauthorized disclosure, and has value.]

[Definition of ["use"/"utilization"]

For the purposes of this instrument, the term ["use"/"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.]⁵

⁵ Facilitators note that this proposed definition is not part of either option; certain delegations have suggested that it be part of any glossary or list of terms. Facilitators have placed this proposed definition here as a placeholder.

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

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

Optional addition

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

Optional addition

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

Optional addition

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

Optional addition

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

Alternative

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

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

[End of alternative]

ARTICLE 4 BIS
DISCLOSURE REQUIREMENT

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

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

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

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

Alternative

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

[End of alternative]

ARTICLE 5

ADMINISTRATION [OF RIGHTS]

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

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

Alternative

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

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

[End of alternative]

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

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

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

ARTICLE 5 BIS

APPLICATION OF COLLECTIVE RIGHTS

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

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

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

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

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

General Exceptions

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

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries;
- (c) is compatible with fair practice;
- (d) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and
- (e) does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.

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

6.4 [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.]

Specific Exceptions

6.5 [Member States]/[Contracting Parties] may permit the use of [protected] traditional knowledge in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, provided that the beneficiaries are adequately compensated.

6.6 [Member States]/[Contracting Parties] may exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

6.7 [Member States]/[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.

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

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

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

Alternative

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

[End of alternative]

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

6.10 [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.]

6.11 [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.]

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

ARTICLE 7
TERM OF PROTECTION

Option 1

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

Optional additions to Option 1

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

Option 2

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

ARTICLE 8
FORMALITIES

Option 1

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

Option 2

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

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

Alternative

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

ARTICLE 9

TRANSITIONAL MEASURES

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

Optional addition

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

Alternative

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

Alternative

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

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

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

Optional additions

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

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

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

Alternative

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

[End of alternative]

Alternative

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

[End of alternative]

ARTICLE 12

TRANS-BOUNDARY COOPERATION

Facilitators' Option (Convergent Text)

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

Option 1

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

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

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

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

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

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

Optional addition to either option

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

ANNEX

TEXT REMOVED BY FACILITATORS FROM WIPO/GRTKF/IC/24/4 OR REV. 1 FOR PURPOSES OF SIMPLIFICATION

ARTICLE 1

Facilitators' Option (Convergent Text)

1.1 [developed in a traditional context]

[traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material heritage of [indigenous peoples and local communities] beneficiaries as defined in Article 2.]

Alternative

1.1 For the purposes of this international instrument, traditional knowledge refers to the cumulative body of age-old knowledge or wisdom that constitutes traditional knowledge and collective knowledge systems that are in constant process of developing innovations, experiences and creative practices, traditional technologies, and environmental knowledge that is closely linked to the language, social relations, spirituality, natural cycles, the conservation and sustainable development of biological diversity.

[End of alternative]

Facilitators' Option (Convergent Text)

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

Optional Additions to the Facilitators' Text

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

ARTICLE 2

Facilitators' Text

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

Optional Additions to the Facilitators' Text

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

Alternative

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

ARTICLE 3

Option 1

3.1

- (a) to develop, maintain, utilize, control, preserve and [protect] their traditional knowledge;
- (b) to authorize or deny the access to and use of their [secret] [protected] traditional knowledge;
- (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;

Option 2

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

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

ARTICLE 6

6.2 Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context, [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.]

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