

The Protection of Traditional Knowledge: Draft Articles

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PREAMBLE/INTRODUCTION

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;

Promote [conservation and] preservation of traditional knowledge

- (iii) 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]];

Consistency with relevant international agreements and processes

- (iv) 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;

POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Prevent [unfair and inequitable uses] misappropriation and misuse

- (i) prevent the misappropriation of [protected] [secret] traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for the prevention of the misappropriation of [protected] [secret] traditional knowledge to national and local needs;*

Promote tradition-based innovation and creativity

- (ii) encourage and reward [and protect] tradition-based creativity and innovation;*

Ensure prior informed consent and exchanges based on mutually agreed terms

- (iii) promote prior informed consent and exchanges based on mutually agreed terms;*

Promote equitable benefit sharing

- (iv) [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;*

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

- (v) prevent the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources;*

[Promote access to knowledge and safeguard the public domain

- (vi) recognize the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain;*

Document and conserve traditional knowledge

- (vii) 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

- (viii) 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;*

USE OF TERMS

For the purposes of this instrument:

Misappropriation means

Option 1

Any access or use of the subject matter without prior informed consent and, where applicable, without mutual agreed terms, for whatever purpose (commercial, research, academic and technology transfer)

Option 2

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

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

["Use"]/["Utilization"] means

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

ARTICLE 1

SUBJECT MATTER OF PROTECTION

The subject matter of this instrument is traditional knowledge, which may be dynamic and evolving, and that is:

- (a) collectively created and maintained by indigenous [peoples] and local communities [or nations];
- (b) linked with the cultural and social identity and cultural heritage of indigenous [peoples] and local communities [or nations]; and
- (c) transmitted from generation to generation, whether consecutively or not.

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 subject matter defined in Article 1.

2.2 [Member States]/[Contracting Parties] may designate a national entity as a custodian of the benefits of protection under this instrument where the subject matter as defined in Article 1:

- (a) is held by a community whose territory is entirely and exclusively coterminous with the territory of that [Member State]/[Contracting Party];
- (b) is not confined to a specific indigenous [people] or local community;
- (c) is not attributable to a specific indigenous [people] or local community; or
- (d) is not claimed by a specific indigenous [people] or local community.

ARTICLE 3

SCOPE OF PROTECTION

3.1 Where the subject matter is sacred, secret or otherwise known only within an indigenous [people] or local community, [Member States]/[Contracting Parties] [should]/[shall] [ensure that beneficiaries have the right to]/[provide legal, policy and administrative measures, as appropriate and in accordance with national law, that allow beneficiaries to]:

- (a) maintain, control and develop said subject matter;
- (b) have users attribute said subject matter to the beneficiaries;
- (c) authorize or deny the access to and use/utilization of said subject matter based on prior and informed consent;
- (d) receive a fair and equitable share of benefits arising from the use/utilization of said subject matter based on mutually agreed terms; and
- (e) [be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications; which may require evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with national law].

3.2 Where the subject matter is not sacred, secret or otherwise known only within an indigenous [people] or local community but is still held, maintained, used [and]/[or] developed by an indigenous [people] or local community, [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] that users:

- (a) attribute and acknowledge the beneficiaries as the source of the subject matter, unless the beneficiaries decide otherwise, or the subject matter is not attributable to a specific indigenous [people] or local community;
- (b) provide the beneficiaries with a fair and equitable share of benefits arising from the use/utilization of said subject matter based on mutually agreed terms; and
- (c) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the subject matter.

3.3 Where the subject matter is publicly available, widely known and in the public domain/not protected by a right, [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] users of said subject matter [to] attribute and acknowledge the beneficiaries as the source of the subject matter, unless the beneficiaries decide otherwise, or the subject matter is not attributable to a specific indigenous [people] or local community.

Alternative

3.3 [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, [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.]

ARTICLE 3 BIS
COMPLEMENTARY MEASURES

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

- (a) facilitate the development of national traditional knowledge databases for the defensive protection of traditional knowledge, including through the prevention of the erroneous grant of patents;
- (b) facilitate, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;
- (c) provide opposition measures that will allow third parties to dispute the validity of a patent by submitting prior art;
- (d) encourage the development and use of voluntary codes of conduct; and
- (e) 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.]

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

- 4.1 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.
- 4.2 The procedures referred to in Paragraph 1 should be accessible, effective, fair, equitable, adequate [appropriate] and not burdensome for [holders]/[owners] of protected traditional knowledge. [They should also provide safeguards for legitimate third party interests and the public interest.]
- 4.3 The beneficiaries [should]/[shall] have the right to initiate legal proceedings where their rights under Paragraphs 1 and 2 are violated or not complied with.
- 4.4 Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.
- 4.5 Where a dispute arises between beneficiaries or between beneficiaries and users of traditional knowledge, each party [may]/[shall be entitled to] refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or [, if both parties are from the same country, by] national law [, and that is most suited to the holders of traditional knowledge].
- 4.6 Where, under applicable domestic law, the wide diffusion of subject matter beyond a recognizable community of practice has been determined to be the result of an act of misappropriation or other violation of national law, the beneficiaries shall be entitled to fair and equitable compensation/royalties.

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].]¹

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] [in consultation with the beneficiaries] [with the involvement of beneficiaries], provided that the use of [protected] traditional knowledge:

- (a) [acknowledges the beneficiaries, where possible;]
- (b) [is not offensive or derogatory to the beneficiaries;]
- (c) [is compatible with fair practice;]
- (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 under the national law of a [Member State]/[Contracting Party] 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.] without consent of the traditional knowledge [holders]/[owners].

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;

¹ Some delegations suggested that language in 6.1 could be better placed in any preambular section.

- (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:]/[The provisions of Article 3 shall not apply to any use of knowledge that:]

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

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 [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.
- (c) 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.
- (d) 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.
- (e) 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.
- (f) 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.