

The Protection of Traditional Knowledge: Draft Articles

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| ~~(cl~~
~~ean-version)~~

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, healthcare, and to the progress of science and technology;

Alternative

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

[End of alternative]

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 relate to intellectual property and access to and benefit sharing from genetic resources which are associated with that traditional knowledge, [as well as the U.N. Declaration on the Rights of Indigenous Peoples;]

[Promote access to knowledge and safeguard the public domain

(v) 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

(vi) 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/or understandings of traditional knowledge holders, including those customary practices, norms, laws and/or understandings that require prior informed consent or approval and involvement and mutually agreed terms before the traditional knowledge can be disclosed, learned or used by others;]

[Promote human rights

(vii) Recognize and protect that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits and that this right may not be subject to distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.]

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;

Alt

[Innovation based on traditional knowledge may contribute to the transfer and dissemination of knowledge for the benefit of the holders and legitimate users of traditional knowledge, as long as it contributes to the facilitation of social and economic welfare and at the balance of rights and obligations remain the same. The protection of the innovation derived from traditional knowledge empowers communities to manage and control the commercial exploitation of owned intellectual property, as well as collectively benefit from it;]

Provide new rules and disciplines

(ixviii) [recognize the need for new rules and disciplines concerning the provision of effective and appropriate means for the enforcement of rights relating to traditional knowledge, taking into account differences in national legal systems;]

Relationship with customary use

(ix) 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].

POLICY OBJECTIVES

~~This instrument should aim to:~~

[Alt 1]

This instrument should aim to:

1. ~~PP~~Provide beneficiaries ~~[and nations]~~ with the means to:

- a. prevent the ~~[misappropriation/]~~illegal appropriation, misuse, and unauthorized use], of their traditional knowledge;
- b. ~~[control ways in which their traditional knowledge is used beyond the traditional and customary context;]~~
- c. achieve the fair and equitable sharing of benefits arising from the use of their traditional knowledge, with prior informed consent or approval and involvement, and taking customary law into consideration as appropriate; and
- d. encourage and protect tradition-based creation and innovation, whether or not commercialized.

[2. Aid in the prevention of the grant of erroneous intellectual property/[patent rights] over [traditional knowledge and [[traditional knowledge] associated [with] genetic resources].]]

[Alt 24]

This instrument should aim to prevent the ~~[misuse]/[unlawful/illegal]~~ appropriation] of protected traditional knowledge and encourage ~~[tradition-based]~~ creation and innovation.]

[Alt 32]

The objective of this instrument is to contribute toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.

Recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.]

~~The objective of this instrument is to benefit mankind by preserving to the holder of traditional knowledge certain limited in scope and duration rights in a manner conducive to social and economic welfare, balances rights and obligations, and that is mutually advantageous to holders and users of traditional knowledge.~~

~~This instrument recognizes the value of a vibrant public domain, the body of knowledge available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.~~

USE OF TERMS

For the purposes of this instrument:

[Misappropriation means

~~[Option-Alt] 1~~

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

~~[Option-Alt] 2~~

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

~~[Option-Alt] 3~~

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

[Alt 4

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

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

[Protected traditional knowledge is traditional knowledge that satisfies the criteria for eligibility under Article 1 and the scope and conditions for protection under Article 3.]

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

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

[Alt 1

Traditional knowledge for the purposes of this instrument, is knowledge that is created, maintained, and developed by indigenous [peoples], ~~and local communities, [and nations/states]~~, and that is linked with, or is an integral part of, the national and/or social identity and/or cultural heritage of indigenous peoples, ~~and local communities, [and nations/states]~~; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.]

~~Alt 1~~

~~**Traditional knowledge** is the collective knowledge of indigenous peoples and local communities, which includes methods, experiences, skills, signs and symbols, and which is part of their cultural heritage and has been developed, [updated] and transmitted from generation to generation.~~

[Alt 2

Traditional knowledge for the purposes of this instrument, is knowledge that is created, maintained, controlled, protected and developed by indigenous ~~people[s]~~[peoples], local communities, [and nations] and that is directly linked with the social identity and/or cultural heritage of indigenous [peoples] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.]

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

[Secret tTraditional Kknowledge] is traditional knowledge that is held by beneficiaries under certain measures of secrecy, in accordance with customary law, and under the common understanding that the traditional knowledge is to be used and known only within the specific group.]

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

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

[Widely dDiffused Ttraditional Kknowledge] is traditional knowledge which is easily accessible by the public but is still culturally connected to its beneficiaries' social identity.]

[Unlawful Aappropriation] is the use of protected traditional knowledge that has been acquired by a user from a traditional knowledge holder through improper means or a breach of confidence which results in a violation of national law in the traditional knowledge holder's country. Use of protected traditional knowledge that has been acquired by lawful means such as independent discovery or creation, reading publications, reverse engineering, and inadvertent or deliberate disclosure resulting from the traditional knowledge holders failure to

| take reasonable protective measures, is not unlawful appropriation.↓

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

[[“Use”]/[“utilization”] means

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

ARTICLE 1

SUBJECT MATTER OF THE INSTRUMENT

[Alt 1

This instrument applies to traditional knowledge.]

[Alt 2

The subject matter of this instrument is traditional knowledge, which is knowledge that is created and maintained in a collective context, that is directly linked with the social identity and/or cultural heritage of indigenous [peoples] ~~people[s]~~ and local communities [and nations]; that is transmitted between generations or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms.]

Alt 2

~~The subject matter of this instrument is traditional knowledge, which is knowledge that is created, maintained, controlled, protected and developed by indigenous people[s] and local communities [and nations] and that is directly linked with the social identity and/or cultural heritage of indigenous people[s] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving.~~

[Criteria for Eligibility

~~Protected traditional knowledge is traditional knowledge that is [distinctively] associated with the cultural heritage of beneficiaries as defined in Article 2, that is generated, [maintained], shared and transmitted in a collective context, is intergenerational and has been used for a term as has been determined by each [Member State]/[Contracting Party] [but not less than 50 years].]~~

[Alt 3

The subject matter of this instrument is traditional knowledge, which is knowledge that is created, maintained, and developed by indigenous ~~people[s]~~[peoples], and local communities, and [nations/states], whether it is widely spread or not, and that is linked with, or is an integral part of, the social identity and/or cultural heritage of indigenous [peoples], and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and may take the form of know-how, skills, innovations, practices, teachings or learnings.

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

[Alt 4This instrument applies to traditional knowledge.

Criteria for Eligibility

In order to be eligible for protection under this instrument, traditional knowledge must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 2, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has been determined by each Member State, but not less than for 50 years.]

ARTICLE 2

BENEFICIARIES OF PROTECTION

~~2.1 Beneficiaries of this instrument are indigenous people[s], local communities, and agencies authorized or competent to oversee the use or exploitation of traditional knowledge in accordance with national law.~~

~~2.2 Member states may also designate competent bodies to act as custodians on behalf of beneficiaries in accordance with national law. The identity of any competent agency shall be communicated to the International Bureau of the World Intellectual Property Organization.~~

[Alt 1

2.1 Beneficiaries of this instrument are indigenous [peoples] and local communities /holders of knowledge who hold protected traditional knowledge as defined in national law.

[2.2 Member states may also designate competent bodies to act as custodians on behalf of beneficiaries, with the [consent/[direct involvement, and approval] of the beneficiaries, when applicable,⁴ in accordance with national law. The identity of any competent agency [should/shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]

[Alt 2

2.1 The beneficiaries of this instrument include, where applicable, indigenous peoples, local communities, states, [nations], and other beneficiaries as may be determined under national law.

2.2 States may establish competent national authorities, as appropriate, to determine beneficiaries of traditional knowledge in consultation with indigenous peoples, local communities, and stakeholders that createproduce, maintain, develop, and exercise rights of traditional knowledge in accordance with customary law and practices.]

[Alt 3

2.1 The beneficiaries of this instrument include, where applicable, indigenous [Ppeoples], local communities, and other beneficiaries as may be determined under national law. ~~Beneficiaries of this instrument are indigenous people[s], local communities, and agencies authorized or competent to oversee the use or exploitation of traditional knowledge in accordance with national law.~~

2.2 Member States may also designate, as deemed appropriate, competent bodies to act as custodians on behalf of the beneficiaries in accordance with national law.] ~~Member states may also designate competent bodies to act as custodians on behalf of beneficiaries in accordance with national law. The identity of any competent agency shall be communicated to the International Bureau of the World Intellectual Property Organization.~~

⁴ ~~Explanatory note: This language is intended to accommodate situations in which beneficiaries cannot be located or identified, and possible other situations that may necessitate the appointment of a competent body or custodian without the consent of the beneficiaries.~~

ARTICLE 3

SCOPE OF [AND CONDITIONS OF] PROTECTION

3.1—Where the [subject matter]/[traditional knowledge]/[protected traditional knowledge] is [sacred], [secret] or [otherwise known] [closely held], as defined by national law, within indigenous [peoples] or local communities, [Member States]/[Contracting Parties] [should]/[shall]:

- (a)—[ensure that beneficiaries have the exclusive and collective right to]/[provide legal, policy and administrative measures, as appropriate and in accordance with national law that allow beneficiaries to]:
 - i.—[produce] [create,] maintain, control and develop said [subject matter]/[traditional knowledge]/[protected traditional knowledge];
 - ii.—discourage the unauthorized disclosure, use or other uses of [secret] [protected] traditional knowledge;
 - iii.—[authorize, deny, or revoke, for good cause, the access to and use/utilization of said [subject matter]/[traditional knowledge]/[protected traditional knowledge] based on prior and informed consent; and]
 - iv.—[be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications, which may [shall] require evidence of compliance with free, prior, informed consent or approval and involvement and benefit sharing requirements, in accordance with national law and international legal obligations];
- (b)—[ensure that]/[encourage] users [to]:
 - i.—attribute said [subject matter]/[traditional knowledge]/[protected traditional knowledge] to the beneficiaries;
 - ii.—[provide beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation], arising from the use/utilization of said [subject matter]/[traditional knowledge] based on mutually agreed terms;]

Alternative

- ii.—enter into an agreement with the beneficiaries to establish terms of use of the
 _____ [subject matter]/[traditional knowledge]/[protected traditional knowledge];

[End of alternative]

- iii.—use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the [subject matter]/[traditional knowledge]/[protected traditional knowledge].

3.2—[Where the [subject matter]/[traditional knowledge]/[protected traditional knowledge] is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is publicly available [but neither widely known, [sacred], nor [secret]], [Member States]/[Contracting Parties] [should]/[shall] [ensure that]/[encourage] that users]/[provide legal, policy

and administrative measures, as appropriate and in accordance with national law to [ensure] [encourage] users [to]]:

- (a) ~~attribute and acknowledge the beneficiaries as the source of the [subject matter]/[traditional knowledge]/[protected traditional knowledge, unless the beneficiaries decide otherwise, or the [subject matter]/[traditional knowledge] is not attributable to a specific indigenous [people] or local community;~~
- (b) ~~[provide the beneficiaries with [a fair and equitable share of benefits]/[fair and equitable compensation] arising from the use/utilization of said [subject matter]/[traditional knowledge]/[protected traditional knowledge] based on mutually agreed terms;]~~

Alternative

- (b) ~~enter into an agreement with the beneficiaries to establish terms of use of the [subject matter]/[traditional knowledge]/[protected traditional knowledge];~~

[End of alternative]

- (c) ~~[use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the [subject matter]/[traditional knowledge]/[protected traditional knowledge]; and][.]]~~
- (d) ~~[be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications, which may [shall] require evidence of compliance with prior informed consent or approval and involvement and benefit sharing requirements, in accordance with national law and international legal obligations].]~~

3.3 ~~Where the [subject matter]/[traditional knowledge]/[protected traditional knowledge] is not protected under Paragraphs 1 or 2 [Contracting Parties shall ensure that users of said [subject matter]/[traditional knowledge]:~~

- (a) ~~attribute said [subject matter]/[traditional knowledge]/[protected traditional knowledge] to the beneficiaries;~~
- (b) ~~use 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]/[traditional knowledge]/[protected traditional knowledge]; and~~
- (c) ~~where applicable, deposit any user fee into the fund constituted by such Contracting Party, except in cases where the use is for research or development leading to new and useful products or processes, and in such cases, provide the beneficiaries with a fair and equitable share of benefits realized from the use of said traditional knowledge, based on prior and informed consent and on mutually agreed terms.~~

[Alt 1

Member States [should/shall] safeguard the economic and moral interests of the beneficiaries concerning [protected] traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner.]

[Alt 2

3.1 Where the [protected] traditional knowledge is secret, whether or not it is sacred, Member ~~states~~ States shall~~[should/shall]~~ ensure that:

- a. Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use.
- b. Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.

3.2 Where the [protected] traditional knowledge is narrowly diffused, whether or not it is sacred, Member ~~Sstates shall~~[should/shall] ensure that:

- ~~(e)~~(a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and
- ~~(f)~~(b) Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.

3.3 Member ~~Sstates~~ should use best endeavors [in consultation with indigenous and local communities,] to protect the integrity of [protected] traditional knowledge that is widely diffused [and sacred]~~-and sacred-.~~

[Alt 3

3.1 Where the traditional knowledge is secret, whether or not it is sacred, Member ~~sStates~~ [should/shall] ensure that:

- a. Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use.
- b. Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.

3.2 Where the traditional knowledge is narrowly diffused, whether or not it is sacred, Member ~~sStates~~ [should/shall] ensure that:

- (a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and
- (b) Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge.

3.3 Where the traditional knowledge is not protected under Paragraphs 3.1 or 3.2, Member States [should/shall] ensure that users of said traditional knowledge:

(a) attribute said traditional knowledge to the beneficiaries;

(b) use 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 traditional knowledge; and

(c) where applicable, deposit any user fee into the fund constituted by such Member state, except in cases where the use is for research or development leading to new and useful products or processes, and in such cases, provide the beneficiaries with a fair and equitable share of benefits realized from the use of said traditional knowledge, based on prior and informed consent and on mutually agreed terms.]

[ARTICLE 3 BIS

COMPLEMENTARY MEASURES

- 3BIS.1 [Member States]/[Contracting Parties] should [endeavour to], subject to and consistent with national and customary law:
- (a) facilitate/encourage the development of [publicly accessible] national traditional knowledge databases for the defensive protection of traditional knowledge, [including through the prevention of the erroneous grant of patents], and/or for transparency, certainty, conservation purposes and/or transboundary cooperation;
 - (b) [facilitate/encourage, as appropriate, the creation, exchange and dissemination of, and access to, [publicly accessible] databases of genetic resources and traditional knowledge associated with genetic resources;]
 - (c) [provide opposition measures that will allow third parties to dispute the validity of a patent [by submitting prior art];]
 - (d) encourage the development and use of voluntary codes of conduct;
 - (e) [discourage information lawfully within the beneficiaries' control from being disclosed, acquired by or used by others without the beneficiaries' [consent], in a manner contrary to fair commercial practices, so long as it is [secret], that reasonable steps have been taken to prevent unauthorized disclosure, and has value;]
 - (f) [consider the establishment of [publicly accessible] databases of traditional knowledge that are accessible to patent offices to avoid the erroneous grant of patents compile and maintain such databases in accordance with national law;
 - i. there should be minimum standards to harmonize the structure and content of such databases;
 - ii. the content of the databases should be:
 - a. languages that can be understood by patent examiners;
 - b. written and oral information regarding traditional knowledge;
 - c. relevant written and oral prior art related to traditional knowledge.]
 - (g) [develop appropriate and adequate guidelines for the purpose of conducting search and examination of patent applications relating to traditional knowledge by patent offices;]
- 3BIS.2 [In order to document how and where traditional knowledge is practiced, and to preserve and maintain such knowledge, efforts [should]/[shall] be made by national authorities to codify the oral information related to traditional knowledge and to develop [publicly accessible] databases of traditional knowledge.]]
- 3BIS.3 [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 or approval and involvement of the traditional knowledge holder.

- 3BIS.4 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.
- 3BIS.5 Efforts [should]/[shall] be made by national authorities to codify the information related to traditional knowledge for the purpose of enhancing the development of [publicly accessible] databases of traditional knowledge, so as to preserve and maintain such knowledge.
- 3BIS.6 Efforts [should]/[shall] also be made to facilitate access to information including information made available in [publicly accessible] databases relating to traditional knowledge by intellectual property offices.
- 3BIS.7 Intellectual property offices [should]/[shall] ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application.]

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

[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 or approval and involvement 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]

Alternative

[NO DISCLOSURE REQUIREMENT

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

[End of alternative]

ARTICLE 5

ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]

5.1 [Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a 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/interests according to their customary protocols, understandings, laws and practices].

Optional addition

[Where so requested by the beneficiaries, a competent authority may, to the extent authorized by the beneficiaries and for their direct benefit, assist with the management of the beneficiaries' rights/interests under this [instrument].]

[End of optional addition]

Alternative

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

[End of alternative]

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

[ARTICLE 6]

EXCEPTIONS AND LIMITATIONS

General Exceptions

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

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

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

Specific Exceptions

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

- (a) teaching, learning, but not research resulting in profit-marking or commercial purposes;
- (b) for preservation, display, research and presentation in archives, libraries, museums or cultural institutions, for non-commercial cultural heritage or other purposes in the public interest; and
- (c) in the case of a national emergency or other circumstances of extreme urgency [or in cases of public non-commercial use];
- (d) [the creation of an original work of authorship inspired by traditional knowledge.]

This provision, with the exception of Subparagraph (c), [should]/[shall] not apply to traditional knowledge described in Article 3.1.]

6.3 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.]

6.4 [[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.]

6.5 [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 approval and involvement; or
- (c) mutually agreed terms for [access and benefit sharing]/[fair and equitable compensation] apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.]]

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

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

ARTICLE 7

TERM OF PROTECTION/RIGHTS

[Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional knowledge in accordance with [Article 3/[which may] [should]/[shall]] last as long as the traditional knowledge fulfills/satisfies the [criteria of eligibility for protection] according to Article [1]/[3].]

ARTICLE 8
FORMALITIES

Option 1

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

Option 2

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

Alternative

[The protection of traditional knowledge under Article 3.1 [should]/[shall] not be subject to any formality. However, in the interest of transparency, certainty and the conservation of traditional knowledge, the relevant national authority (or authorities) or intergovernmental regional authority (or authorities) may maintain registers or other records of traditional knowledge to facilitate protection under Articles 3.2 and 3.3.]

[End of alternative]

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]/[3].

Optional addition

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

Alternative

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

Alternative

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

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

[ARTICLE 10

RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS

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

[ARTICLE 11

NATIONAL TREATMENT

[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

TRANSBOUNDARY COOPERATION

12.1 In instances where the same [protected] traditional knowledge [under Article 3] is found within the territory of more than one [Member State]/[Contracting Party], those [Member States]/[Contracting Parties] [should]/[shall] endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this [instrument].

12.2 Where the same [protected] traditional knowledge [under Article 3] is shared by one or more indigenous and local communities in several [Member States]/[Contracting Parties], those [Member States]/ [Contracting Parties] [should]/[shall] endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objectives of this [instrument].

[End of Annex and of Document]