

This Facilitators Note has no status and is not a revision of the draft articles. It is produced to elicit further comments from Member States on the core issues detailed below prior to production of Rev 1.

POLICY OBJECTIVES

Original text

This instrument should aim to:

Provide Indigenous [Peoples] and [local communities] [and nations]/[beneficiaries] with the [legal and practical/appropriate] means, [including effective and accessible enforcement measures/sanctions, remedies and exercise of rights], to:

- a. [prevent] the [misappropriation/misuse/unauthorized use/unfair and inequitable uses] of their traditional knowledge;*
- b. [control ways in which their traditional knowledge is used beyond the traditional and customary context;]*
- c. [promote [the equitable sharing of benefits arising from their use with prior informed consent or approval and involvement or approval and involvement]/[fair and equitable compensation], as necessary; and]*
- d. encourage [and protect] [tradition-based] creation and innovation.*

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

Option 1

This instrument should aim to:

1. Provide beneficiaries, as defined in Article 2, with the means to:

- a. prevent the misappropriation, 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. equitably share in the benefits arising from the use of their traditional knowledge with prior informed consent or approval and involvement, as appropriate; and*
- d. protect their tradition-based creations and innovations.*

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

Option 2

This instrument should aim to prevent the misuse of traditional knowledge and encourage tradition-based creation and innovation.

Note: The U.S. also proposed the following additions:

The protection of protected traditional knowledge should contribute towards the promotion of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of traditional knowledge, in a manner conducive to social and economic welfare and to a balance of rights and obligations. The objective of protecting traditional knowledge should also be to the benefit of mankind, but encouraging a sharing of information, ie. to promote the public domain. Yet also preserving to the holder of traditional knowledge certain limited in scope duration rights.

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.

USE OF TERMS

Traditional knowledge for the purposes of this instrument, is knowledge that is maintained, controlled, protected and developed by indigenous people[s] and local communities 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, 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.

Note: This revised definition relates to Option 1 of Article 1.

ARTICLE 1

SUBJECT MATTER OF THE INSTRUMENT

Option 1

This instrument applies to traditional knowledge.

Option 2

The subject matter of this instrument 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 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.

Option 3

The subject matter of this instrument is knowledge that is maintained, **controlled, protected and developed** by indigenous people[s] and local communities 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.

Note: The above options are intended to be operative without a separate paragraph on criteria for eligibility.

Original text minus criteria for eligibility

The subject matter of [protection]/[this instrument] is traditional knowledge:

- (a) that is created, and [maintained] in a collective context, by indigenous [peoples] and local communities [or nations] [,whether it is widely spread or not];*
- (b) that is [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];*
- (c) that is transmitted from generation to generation, whether consecutively or not;*
- (d) which may subsist in codified, oral or other forms; and [or]*
- (e) which may be dynamic and evolving.*

ARTICLE 2

BENEFICIARIES OF PROTECTION

Original text

2.1 Beneficiaries [of protection] are indigenous [peoples] and local communities [and/or nations] who create, [hold], maintain, use and/[or] develop the [subject matter]/[traditional knowledge] [meeting the criteria for eligibility defined in Article 1]/[3].]

Alternative

2.1 [Beneficiaries of [protection] are indigenous [peoples] and local communities¹¹ who create, [hold], maintain, use and/[or] develop the [subject matter]/[traditional knowledge] defined in Article 1.]

[End of alternative]

2.2 [Where the [subject matter]/[traditional knowledge] [is not claimed by specific indigenous [peoples] or local communities despite reasonable efforts to identify them,] [Member States]/[Contracting Parties] may designate a national authority as custodian of the [benefits]/[beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional knowledge] [traditional knowledge meeting the eligibility criteria in Article 1] as defined in Article 1:

- (a) is held by a community [whose] in a territory [is] that 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.]

2.3 [The [identity] of any national authority established under Paragraph 2 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

Option 1

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

2.2 The identity of any competent agency under Paragraph 1 shall be communicated to the International Bureau of the World Intellectual Property Organization.

¹¹ [Where a [Member State's]/[Contracting Party's] constitution [does not recognize] indigenous or local communities, then that [Member State]/[Contracting Party] may act as a beneficiary with regard to the traditional knowledge that exists within its territory.] [Note: This footnote is to be read as part of the alternative to Paragraph 1.]

Option 2

2.1 Beneficiaries of this instrument are indigenous people[s] and local communities, as defined in national law. Member states may also designate competent bodies to act as custodians on behalf of beneficiaries in accordance with national law.

2.2 The identity of any competent body established under Paragraph 1 shall be communicated to the International Bureau of the World Intellectual Property Organization.