

The Protection of Traditional Knowledge: Draft Articles

Facilitators' Rev. (December 9, 2022)

(clean version)

PREAMBLE/INTRODUCTION

1. ACKNOWLEDGING the **UN Declaration on the Rights of Indigenous Peoples**, and the aspirations of indigenous [peoples] and local communities [therein];
2. [[Recognizing that indigenous [peoples] and local communities have the right] Recognizing the rights of indigenous [peoples] and the interests of local communities] to maintain, control, protect and develop their intellectual property over their cultural heritage, including their traditional knowledge;]
3. Recognizing that the situation of the indigenous [peoples] and local communities varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration;
4. Recognizing that the traditional knowledge of indigenous [peoples] and local communities have [intrinsic] value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values;
5. Acknowledging that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are [intrinsically] important for indigenous [peoples] and local communities;
6. Respecting the continuing customary use, development, exchange and transmission of traditional knowledge by, within and between communities;
7. Promoting respect for traditional knowledge systems, for the dignity, cultural integrity and spiritual values of the traditional knowledge holders who conserve and maintain those systems.
8. Acknowledging that the protection of traditional knowledge should contribute toward the promotion of creativity and innovation, and to the transfer and dissemination of knowledge to the mutual advantage of holders and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.
9. [Promoting intellectual and artistic freedom, research or other fair practices and cultural exchange [based on mutually agreed terms including fair and equitable sharing of benefits and subject to the free, prior and informed consent and approval and involvement of indigenous [peoples],[local communities and nations/beneficiaries];]
10. [Ensuring mutual supportiveness with international agreements relating to the protection and safeguarding of traditional knowledge, and those relating to IP;]
11. Recognizing and reaffirming the role the IP system plays in promoting innovation and creativity, transfer and dissemination of knowledge and economic development, to the mutual advantage of stakeholders, providers and users of traditional knowledge;
12. Recognizing 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 and preserve the public domain];
13. [Recognizing 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;]

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

[ARTICLE 1
USE OF TERMS

For the purposes of this instrument:

[Misappropriation] means

[Alt 1

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

[Alt 2

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.]]

[Alt 3

Any access to 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.]]

[Facilitators' Alt

Any access or use of traditional knowledge of indigenous peoples or local communities without their free, prior and informed consent and mutually agreed terms, or inconsistent with their established codes and practices.]

[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 as 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 substantive traditional knowledge that is distinctively associated with the cultural heritage of [beneficiaries as defined in Article 4] indigenous [peoples] and local communities, and is 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 for not less than 50 years or a period of five generations, and satisfies the scope and conditions for protection under Article 5.]

[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.]

[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.]

Traditional Knowledge refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that is dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.

[Alt 1

Secret traditional knowledge is traditional knowledge that is held and regarded as secret by applicable indigenous [peoples] and local communities [beneficiaries] in accordance with their customary laws, protocols, practices under the understanding that the use or application of the traditional knowledge is constrained within a framework of secrecy.]

[Alt 2

Secret traditional knowledge is traditional knowledge that is not generally known or readily accessible to the public; has commercial value because it is secret; and has been subject to measures to maintain secrecy of the knowledge.]

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

[Narrowly diffused traditional knowledge is [non-secret] 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 diffused traditional knowledge is [non-secret] traditional knowledge which is easily accessible by the public [but is still culturally connected to its beneficiaries' social identity].]

[Unlawful appropriation is the use of [protected] traditional knowledge that has been acquired by a user from a [protected] traditional knowledge holder through improper means or a breach of confidence which results in a violation of national law in the [protected] 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 [protected] 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 [protected] traditional knowledge is included in a product [or] where a product has been developed or obtained on the basis of [protected] 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 [protected] traditional knowledge is included in a process [or] where a process has been developed or obtained on the basis of [protected] 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 [protected] traditional knowledge in non-commercial research and development; or
- (d) the use of [protected] traditional knowledge in commercial research and development.]]

Facilitators' Alt

[[“Use”]/[“utilization”] means

- (a) where the [protected] traditional knowledge is included in a product, or where a product has been developed or obtained on the basis of [protected] traditional knowledge, the manufacturing, importing, offering for sale, selling, stocking or exploiting the product.
- (b) where the [protected] traditional knowledge is included in a process [or] where a process has been developed or obtained on the basis of [protected] traditional knowledge: exploiting of the process; or 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) where the [protected] traditional knowledge is included as part of commercial or non-commercial research and development.

[ARTICLE 2
OBJECTIVES

Facilitators' Alternative

The objectives of this instrument are to:

- (a) Provide effective and adequate protection of traditional knowledge;
- (b) Prevent the erroneous grant of intellectual property rights over traditional knowledge;
and
- (c) [Recognize indigenous peoples and local communities as holders of traditional knowledge].

[Alt 1

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- (a) unauthorized¹ and/or uncompensated² uses of traditional knowledge; and
- (b) the erroneous grant of intellectual property rights over traditional knowledge,

[while supporting the appropriate use of traditional knowledge].]

[Alt 2

The objective of this instrument is to support the appropriate use and effective, balanced and adequate protection of traditional knowledge within the intellectual property system, in accordance with national law, recognizing the rights of [indigenous [peoples] and local communities] [beneficiaries].]

[Alt 3

The objective of this instrument is to support the appropriate use of traditional knowledge within the patent system, in accordance with national law, respecting the values of traditional knowledge holders, by:

- (a) contributing 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;
- (b) recognizing 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; and
- (c) preventing the erroneous grant of patent rights over non-secret traditional knowledge.]]

¹ Unauthorized uses comprise inter alia misappropriation, misuse and unlawful uses of traditional knowledge.

² Uncompensated uses include the failure to provide monetary or non-monetary benefits.

[ARTICLE 3

[PROTECTION CRITERIA/ELIGIBILITY CRITERIA]

Facilitators' Alternative

3.1 Protection shall be extended under this instrument to traditional knowledge, which is:

(a) created, generated, received by, or revealed to, indigenous [peoples], local communities and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, and is an integral part of, the cultural and social identity and traditional heritage of indigenous peoples, local communities; and

(c) transmitted within a generation or from generation to generation, whether consecutively or not.

[3.2 A Member State/Contracting party may, under its national law, specify additional criteria for protection for traditional knowledge that is linked with, and is an integral part of, the traditional knowledge of a nation or group within their jurisdiction.]

[Alt 1

3.1. Subject to Article 3.2, protection shall be extended under this instrument to traditional knowledge, which is:

(a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, and is an integral part of, the cultural and social identity and traditional heritage of indigenous peoples, local communities and/or [other beneficiaries]; and

(c) transmitted between or from generation to generation, whether consecutively or not.

3.2 A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional knowledge for a reasonable term as determined by the Member State/Contracting Party.]

[Alt 2

Protection should be extended under this instrument to traditional knowledge which is:

(a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, is an integral part of, and is distinctively associated with, the cultural identity and traditional heritage of indigenous peoples, local communities and/or [other beneficiaries]; and

(c) [may be] transmitted between or from generation to generation, whether consecutively or not for a term not less than fifty years or five generations.]

[3.2 A Member State/Contracting Party may, under its national law, recognize protection for other beneficiaries who have created relevant subject matter.]]

[Alternative ARTICLE 3

[SUBJECT MATTER OF THE INSTRUMENT]

This instrument applies to patents and traditional knowledge, that is:

- (a) distinctively associated with the cultural heritage of beneficiaries as defined in Article 4;
and
- (b) 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 50 years or a period of five generations.]

[ARTICLE 4
BENEFICIARIES

[Alt 2

Beneficiaries of [protection under] this instrument are indigenous [peoples] and local communities who hold [protected] traditional knowledge.]

Facilitators' Alternative

4.1 The beneficiaries under this instrument are:

- (a) indigenous peoples and local communities, and
- (b) where applicable and as determined under national law, other right holders of traditional knowledge meeting the criteria set out in Article 3,.]

4.2 Member States/Contracting Parties may provide for national authorities to have a role in the administration of benefits relating to the implementation of this instrument in accordance with national law.

[ARTICLE 5

SCOPE [AND CONDITIONS] OF PROTECTION

[Facilitators' Alternative

Member States/Contracting Parties shall take legislative, administrative and/or policy measures, as appropriate, and in accordance with national law, in a reasonable and balanced manner, to provide that:

- (a) Where, with reference to the customary laws or practices of indigenous peoples, local communities, or beneficiaries, access to traditional knowledge is restricted or the traditional knowledge is closely held, including where the traditional knowledge is secret or sacred, beneficiaries have exclusive collective rights:
 - i. 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 their use; and
 - ii. of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.

- (b) Where, with reference to the customary laws and practices of indigenous [peoples], local communities or beneficiaries, the traditional knowledge is not restricted or closely held, beneficiaries are to:
 - i. receive a fair and equitable share of benefits arising from its use; and
 - ii. have the right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.

- (c) In other cases where it appears that traditional knowledge will be used, but it is unclear if it is associated with a particular indigenous peoples, local community or beneficiary:
 - (i) before the traditional knowledge is used, an attempt should be made to determine whether there are indigenous peoples, local communities or beneficiaries who are able to speak for that traditional knowledge, and
 - (ii) if identified, consultation should occur with those indigenous peoples, local communities or beneficiaries.]

[Alt 1

5.1 Member States [should/shall] [safeguard] [protect] the economic and moral [interests] [rights] of the beneficiaries concerning [protected] traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, [taking into consideration

exceptions and limitations, as defined in Article 9, and in a manner consistent with Article 14] [in a reasonable and balanced manner].

5.2 Protection under this instrument does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.]

[Alt 2

5.1 Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, with the aim of ensuring that:

(a) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional knowledge is restricted, including where the traditional knowledge is secret or sacred:

iii. 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.

iv. Beneficiaries have the right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.

(b) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, the traditional knowledge is no longer under the exclusive control of beneficiaries, but is still distinctively associated with the beneficiaries' cultural identity:

iii. Beneficiaries receive a fair and equitable share of benefits arising from its use; and

iv. Beneficiaries have the right of attribution and the right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.

5.2 [For traditional knowledge that is being utilized without the prior informed consent and/or not in accord with customary laws and practices of indigenous [peoples] and local communities, indigenous [peoples] and local communities [or other beneficiaries], as applicable, shall have the possibility to request from the relevant national authorities protection provided for in paragraph 5.1(a), taking into account all relevant circumstances, such as: historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized utilization.]]

[Alt 3

Where traditional knowledge is distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and 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 or a period of five generations, traditional knowledge should be protected according to the scope and conditions defined below:

5.1 Where the protected traditional knowledge is secret, whether or not it is sacred, Member States should encourage that:

(a) Beneficiaries that directly communicate traditional knowledge to users, have the possibility under national law to maintain, control, use, develop, authorize or prevent access to and use/utilization of their protected traditional knowledge; and receive a fair and equitable share of benefits arising from its use by said users.

(b) Users identify clearly discernible holders of said protected traditional knowledge and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries.

5.2 Where the protected traditional knowledge is narrowly diffused, whether or not it is sacred, Member States should encourage as a best practice that:

(a) Beneficiaries that directly communicate protected traditional knowledge to users receive a fair and equitable share of benefits arising from its use by said users; and

(b) Users identify clearly-discernable holders of the protected traditional knowledge when using said traditional knowledge, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries.

5.3 Member States should use best endeavors to archive and preserve traditional knowledge that is widely diffused.]]

[ARTICLE 5BIS

[DATABASE], [COMPLEMENTARY] [AND] [DEFENSIVE] PROTECTION

Database Protection

[Recognizing the importance of cooperation and consultation] Member States should endeavor to cooperate and consult with Indigenous Peoples and Local Communities [in determining access] [to traditional knowledge], [Member States should endeavor to], subject to and consistent with national [and customary] law, [facilitate and encourage the development of] [the following] [national traditional knowledge databases to which beneficiaries may voluntarily contribute their traditional knowledge] as follows:

5BIS.1 Publicly accessible national [traditional knowledge] databases publicly available traditional knowledge for the purpose of transparency, certainty, conservation, and transboundary cooperation, and to facilitate and encourage, as appropriate, the creation, exchange and dissemination of, and access to traditional knowledge.

[5BIS.2 National [traditional knowledge databases of publicly available traditional knowledge accessible only by intellectual property offices for the purpose of prevention of the erroneous grant of intellectual property rights. Intellectual property offices should seek to ensure that such information is maintained in confidence, except where the information is cited during the examination of an application for intellectual property protection.]

5BIS.3 Non-public national traditional knowledge databases for the purpose of [codify] [codifying] and conserving traditional knowledge within indigenous and local communities. Non-public national traditional knowledge databases should only be accessible by beneficiaries in accordance with their respective [customary] laws] and established practices that govern the access or use of such traditional knowledge.

[Complementary][Defensive] Protection

5BIS.4 [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;]

5BIS.5 [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.]] in consultation with Indigenous Peoples and Local Communities that hold this information.

5BIS.6 [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] as defined in to Section 2 is included in a database, the [protected] traditional knowledge should only be made available to others with the free, prior and informed consent or approval and involvement of the traditional knowledge holder.]

5BIS.7 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] patent, and thus [should]/[shall] not include secret traditional knowledge.

5BIS.8 Efforts [should]/[shall] be made by national authorities to considering codify the publicly accessible 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.

5BIS.9 Efforts [should]/[shall] also be made to facilitate access to publicly accessible information including information made available in [publicly accessible] databases relating to traditional knowledge by intellectual property offices.

5BIS.10 [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 6

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

[Alt 1

Member States [shall] [should] put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument.]

[Alt 2

6.1 [Member States [should]/[shall] ensure that [accessible, appropriate and adequate] [criminal, civil [and] or administrative] enforcement procedures[, dispute resolution mechanisms][, 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.]

6.2 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.]

6.3 [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.]

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

6.5 [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].]

6.6 [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.]

6.7 [If an infringement of the rights protected by this instrument is determined in the procedure established in Paragraph 6.1, the sanctions may consider the inclusion of restorative justice measures, according to the nature and effect of the infringement.]]

[ARTICLE 7

DISCLOSURE REQUIREMENT

[Alt 1

Where required by national law, the users of traditional knowledge shall comply with requirements concerning the disclosure of source and/or origin of traditional knowledge.]

[Alt 2

7.1 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] 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 free, prior and informed consent or approval and involvement to access and use has been obtained.]

7.2 [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] applicant collected or received the traditional knowledge.]

7.3 [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 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 intellectual property office may reject the application.]

7.4 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has failed to comply with mandatory requirements or provided false or fraudulent information.]]

[Alt 3

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

7.2 [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] applicant collected or received the [protected] traditional knowledge.]

7.3 [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] 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] intellectual property office may reject the application.]

7.4 [Rights arising from a granted patent 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, provided for in national law, including criminal sanctions such as fines, may however be imposed.]

7.5 [Rights arising from a grant shall be revoked and rendered unenforceable when the applicant has knowingly provided false or fraudulent information.]]

[Alt 4

[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.]]]

[ARTICLE 8

ADMINISTRATION [OF RIGHTS]/[OF INTERESTS]

[Alt 1

[Member States]/[Contracting Parties] [may]/[shall] [establish]/[appoint] a competent authority or authorities, with the [direct involvement and approval of] [free, prior and informed consent of] [in consultation with] [beneficiaries] [traditional knowledge holders], in accordance with their national law [to administer the rights/interests provided for by this instrument] [and without prejudice to the right of [beneficiaries] [traditional knowledge holders] to administer their rights/interests according to their customary protocols, understandings, laws and practices].]

[Alt 2

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

[Alt 3

Member States may establish competent authorities, in accordance with national and customary law, that are responsible for the national traditional knowledge databases provided for by this [instrument]. Responsibilities may include the receipt, documentation, storage and online publication of information relating to traditional knowledge.]]

[ARTICLE 9

EXCEPTIONS AND LIMITATIONS

[Facilitators' Alternative

9.1 Member States/Contracting Parties may adopt appropriate exceptions and limitations, in consultation with the beneficiaries where applicable, provided that they do not unreasonably prejudice the legitimate interests of the beneficiaries, taking account of the legitimate interests of third parties.

9.2 Any exceptions or limitations adopted by Member States/Contracting Parties should not conflict with the normal use, or use under customary laws, of traditional knowledge by the beneficiaries.

[Alt 1

In complying with the obligations set forth in this instrument, Member States [may in special cases,] [should] adopt justifiable exceptions and limitations necessary to protect the public interest, in consultation with the beneficiaries, where applicable, provided such exceptions and limitations shall not unreasonably conflict with the rights of beneficiaries nor unduly prejudice the implementation of this instrument.]

[Alt 2

General Exceptions

9.1 [Member States]/[Contracting Parties] [may] [should] adopt appropriate limitations and exceptions under national law [with the free, prior and 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;] or
- (d) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

9.2 [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

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

- (a) teaching, learning, but not research resulting in profit-making 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, to protect public health or the environment [or in cases of public non-commercial use];
- (d) [the creation of an original work of authorship inspired by traditional knowledge];
- (e) to exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

This provision, with the exception of Subparagraph (c), [should]/[shall] not apply to traditional knowledge described in Article 5(a)/5.1.]

9.4 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.]

9.5 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 5 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.]

9.6 [[Protected] traditional knowledge shall not be deemed to have been misappropriated or misused if:

- (a) the [protected] traditional knowledge was obtained from a printed publication;
- (b) the [protected] traditional knowledge was obtained from one or more holders of the [protected] traditional knowledge with their free, prior and 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.]]

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

ARTICLE 10

TERM OF PROTECTION/RIGHTS

[Facilitators' Alt

The protection of traditional knowledge under this instrument shall apply as long as the traditional knowledge continues to satisfy the criteria of eligibility for protection under Article 3 of this instrument.]

[[Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional knowledge in accordance with [Article 5/[which may] [should]/[shall] last as long as the traditional knowledge fulfills/satisfies the [criteria of eligibility for protection] according to Article [3]/[5].]

ARTICLE 11
FORMALITIES

[Facilitators' Alt

Without prejudice to the maintenance of registers or other records of traditional knowledge to facilitate protection where applicable, adherence to formalities by indigenous peoples and local communities shall not be a precondition for protection of traditional knowledge under this instrument].

[Alt 1

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

[Alt 2

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

[Alt 3

[The protection of traditional knowledge under Article 5 [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 Article 5.]]

ARTICLE 12

TRANSITIONAL MEASURES

12.1 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 [3]/[5].

[Optional addition]

12.2 [[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]

12.2 [[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]

12.2 [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 13

RELATIONSHIP WITH OTHER INTERNATIONAL [AGREEMENTS

[Facilitators' Alt

This instrument shall be implemented in a mutually supportive manner with other international agreements relevant to the instrument, including the United Nations Declaration on the Rights of Indigenous Peoples.]

13.1 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] instruments.]

[13.2 Nothing in this instrument shall be interpreted as prejudicing or detrimental to the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.]

[13.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretation shall be guided by the provisions of the said Declaration.]

ARTICLE 14

NON-DEROGATION

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

[ARTICLE 15

NATIONAL TREATMENT

[Facilitators' Alt

The same rights and benefits recognized in relation to traditional knowledge by a Member State/Contracting Party for beneficiaries who are its nationals shall be extended to foreign beneficiaries in its territory.]

Alt. 1

[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.]

Alt. 2

[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]

Alt. 3

[Each [Member State]/[Contracting Party] [should]/[shall] in respect of traditional knowledge that fulfills the criteria set out in Article 3, accord within its territory to beneficiaries of protection as defined in Article 4, 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 16

TRANSBOUNDARY COOPERATION

[Facilitators' Alt

Where the same traditional knowledge is found within the territory of more than one Member State/Contracting Party, those Member States/Contracting Parties shall endeavor to cooperate, with the involvement of the indigenous peoples and local communities concerned, as appropriate, with a view to implementing the objectives of this instrument.]

Alt. 1

Where the same [protected] traditional knowledge [under Article 5] is found within the territory of more than one [Member State]/[Contracting Party], or 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].]

Facilitators' Draft

ARTICLE 16

REVIEW

Member States/Contracting Parties will undertake a review of the scope and contents of this instrument, no later than five years after the entry into force of the instrument.

[End of Document]