

Recognising and Protecting Indigenous Knowledge Associated with Natural Resource Management



Part 2: A detailed review of the international agreements and proposals relevant to this project

The Nagoya Protocol

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity* is a supplementary agreement to the Convention on Biological Diversity (CBD). It provides a framework for implementing fair and equitable sharing of benefits arising out of the utilization of genetic resources under the CBD. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan. Australia signed the Protocol in January 2012.

The Nagoya Protocol applies to genetic resources that are covered by the CBD, and to the benefits arising from their utilization. The Nagoya Protocol also covers traditional knowledge (TK) associated with genetic resources that are covered by the CBD and the benefits arising from its utilization.

The following is a simplified summary of the key provisions of the Protocol that are relevant to this project. It is provided to assist with understanding the issues access and benefit-sharing legislation must address. This in turn provides a framework for evaluating legislation from other countries as models for Australian legislation. This summary was also provided in Part 1 of this report.

Application (Articles 1 to 3)

The Protocol applies to genetic resources in their country of origin and to the benefits arising from the use of those resources. It also applies to traditional knowledge associated with those genetic resources and to the benefits arising from the use of that traditional knowledge.

Relationship with International Agreements and Instruments (Article 4)

The provisions of this Protocol do not affect the rights and obligations under any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

Countries may develop and implement other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and the Protocol.

The Protocol must be implemented in a mutually supportive manner with other relevant international instruments.

The Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and the Protocol, it applies instead of the Protocol to that particular arrangement.

Fair and equitable benefit sharing (Articles 5, 9, 10, 11, 12, Annex)

Benefits arising from the use of genetic resources must be shared in a fair and equitable way with the country providing the resources upon mutually agreed terms.

The Protocol recognises that countries may have domestic legislation regarding the established rights of Indigenous and local communities over genetic resources. Countries need to take appropriate measures to ensure that benefits arising from the use of genetic resources that are held by Indigenous and local communities are shared in a fair and equitable way with the communities concerned on mutually agreed terms.

Benefits may include monetary and non-monetary benefits, including:

Access fees/fee per sample collected or otherwise acquired;

Up-front payments;

Milestone payments;

Payment of royalties;

Licence fees in case of commercialization;

Special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;

Salaries and preferential terms where mutually agreed;

Research funding;

Joint ventures;

Sharing of research and development results;

Collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the Party providing genetic resources;

Participation in product development;

Collaboration, cooperation and contribution in education and training;

Admittance to *ex situ* facilities of genetic resources and to databases;

Transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;

Strengthening capacities for technology transfer;

Institutional capacity-building;

Human and material resources to strengthen the capacities for the administration and enforcement of access regulations;

Training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries;

Access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;

Contributions to the local economy;

Research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources;

Institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities;

Food and livelihood security benefits;

Social recognition; and

Joint ownership of relevant intellectual property rights.

Countries must take appropriate measures so that the benefits arising from the use of traditional knowledge associated with genetic resources are shared in a fair and equitable way with Indigenous and local communities holding such knowledge upon mutually agreed terms.

Countries must encourage users and providers to direct benefits arising from the use of genetic resources towards the conservation of biological diversity and the sustainable use of its components.

Global Multilateral Benefit-Sharing Mechanism

Countries must consider the need for and modalities of a global multilateral benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of genetic resources and traditional knowledge associated with genetic resources that occur in trans-boundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits

shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism must be used to support the conservation of biological diversity and the sustainable use of its components globally.

Countries must endeavour to support the development by Indigenous and local communities, including women within these communities, of: community protocols in relation to the fair and equitable sharing of benefits arising out of the use of such knowledge; minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the use of traditional knowledge associated with genetic resources; and model contractual clauses for benefit-sharing arising from the use of traditional knowledge associated with genetic resources.

Access to genetic resources and traditional knowledge relating to their use (Articles 6, 7, 11, 12)

The sovereign right of countries over their natural resources is recognised under the CBD and the Protocol. The exercise of those sovereign rights is subject to domestic access and benefit-sharing legislation or regulatory requirements. Taking those domestic arrangements into consideration, access to genetic resources requires the prior informed consent of the country providing the resources, unless otherwise determined by that country.

Prior informed consent

Where Indigenous and local communities have an established right to grant access to genetic resources in a country the country must take steps in accordance with domestic law to ensure that prior informed consent or approval and involvement for access to those genetic resources is obtained from the relevant Indigenous and local communities.

In implementing the requirement for prior informed consent a country must:

- (a) Provide for legal certainty, clarity and transparency of their domestic access and benefit-sharing legislation or regulatory requirements;
- (b) Provide for fair and non-arbitrary rules and procedures on accessing genetic resources;
- (c) Provide information on how to apply for prior informed consent;
- (d) Provide for a clear and transparent written decision by a competent national authority, in a cost-effective manner and within a reasonable period of time;
- (e) Provide for the issuance at the time of access of a permit or its equivalent as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms, and notify the Access and Benefit sharing Clearing-House accordingly;

(f) Where applicable, and subject to domestic legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources; and

(g) Establish clear rules and procedures for requiring and establishing mutually agreed terms. Such terms shall be set out in writing and may include, *inter alia*:

(i) A dispute settlement clause;

(ii) Terms on benefit-sharing, including in relation to intellectual property rights;

(iii) Terms on subsequent third-party use, if any; and

(iv) Terms on changes of intent, where applicable.

Access to traditional knowledge

Countries must ensure that traditional knowledge associated with genetic resources that is held by Indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these Indigenous and local communities, and that mutually agreed terms have been established.

Transboundary Cooperation

In instances where the same genetic resources are found *in situ* in more than one country, those countries shall endeavour to cooperate, with the involvement of any Indigenous and local communities concerned, with a view to implementing this Protocol.

Where the same traditional knowledge associated with genetic resources is shared by one or more Indigenous and local communities in several countries, those countries shall endeavour to cooperate, with the involvement of the Indigenous and local communities concerned, with a view to implementing the objective of this Protocol.

Traditional Knowledge Associated with Genetic Resources

In implementing their obligations under the Protocol, countries must take into consideration Indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

Countries, with the effective participation of the Indigenous and local communities concerned, must establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and

Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the use of such knowledge.

Countries must endeavour to support the development by Indigenous and local communities, including women within these communities, of community protocols in relation to access to traditional knowledge associated with genetic resources.

Special Considerations (Article 8)

In the development and implementation of its access and benefit-sharing requirements, each country must:

- (a) Create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries. This includes simplified access for non-commercial research purposes, taking into account the need to address a change of intent for such research;
- (b) Pay due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health, as determined nationally or internationally. Countries may take into consideration the need for expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries;
- (c) Consider the importance of genetic resources for food and agriculture and their special role for food security.

National Focal Points and Competent National Authorities (Article 13)

Each country must designate a national focal point on access and benefit-sharing. The national focal point must make the following information available:

- (a) For applicants seeking access to genetic resources, information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing;
- (b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of Indigenous and local communities and establishing mutually agreed terms including benefit-sharing; and

(c) Information on competent national authorities, relevant Indigenous and local communities and relevant stakeholders.

The national focal point is responsible for liaison with the CBD Secretariat.

Each country must designate one or more competent national authorities on access and benefit-sharing. Competent national authorities must, in accordance with applicable national legislative, administrative or policy measures, be responsible for granting access or, as applicable, issuing written evidence that access requirements have been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.

A single entity can fulfil the functions of both focal point and competent national authority.

If a country designates more than one competent national authority, it must advise the Secretariat, of the respective responsibilities of those authorities.

The Access and Benefit-Sharing Clearing-House and Information-Sharing (Article 14)

An Access and Benefit-sharing Clearing-House is established under the Protocol as part of the clearing-house mechanism under the CBD to serve as a means for sharing of information related to access and benefit-sharing. In particular, it will provide access to information made available by each Country relevant to the implementation of this Protocol.

Without prejudice to the protection of confidential information, each country must make available to the Access and Benefit-sharing Clearing-House any information required by the Protocol, as well as information required by decisions taken by the Parties to the Protocol. The information includes:

- (a) Legislative, administrative and policy measures on access and benefit-sharing;
- (b) Information on the national focal point and competent national authority or authorities; and
- (c) Permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.

Additional information, if available and as appropriate, may include:

- (a) Relevant competent authorities of Indigenous and local communities, and information as so decided;

- (b) Model contractual clauses;
- (c) Methods and tools developed to monitor genetic resources; and
- (d) Codes of conduct and best practices.

Compliance measures and Monitoring (Articles 15, 16, 17, 18 and 29)

Access

Each country must provide that genetic resources used within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other country.

Traditional knowledge

Each country must also provide that traditional knowledge associated with genetic resources used within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of Indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other country where the Indigenous and local communities are located.

Appropriate measures to address situations of non-compliance must also be provided. Countries must, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic requirements.

Monitoring

Each country must take appropriate steps to monitor and enhance transparency about the use of genetic resources. These measures must include:

- (a) The designation of one or more checkpoints, as follows:
 - (i) Designated checkpoints would collect or receive, as appropriate, relevant information related to prior informed consent, to the source of the genetic resource, to the establishment of mutually agreed terms, and/or to the utilization of genetic resources, as appropriate;
 - (ii) Each country must require users of genetic resources to provide the information specified above at a designated checkpoint. Each country must take appropriate, effective and proportionate measures to address situations of non-compliance;

(iii) the information, including from internationally recognized certificates of compliance where they are available, will, without prejudice to the protection of confidential information, be provided to relevant national authorities, to the country providing prior informed consent and to the Access and Benefit-sharing Clearing-House, as appropriate;

(iv) Checkpoints must be effective and should have functions relevant to implementation of subparagraph (a). They should be relevant to the utilization of genetic resources, or to the collection of relevant information at, *inter alia*, any stage of research, development, innovation, pre-commercialization or commercialization.

(b) Encouraging users and providers of genetic resources to include provisions in mutually agreed terms to share information on the implementation of such terms, including through reporting requirements; and

(c) Encouraging the use of cost-effective communication tools and systems.

A permit or its equivalent issued in accordance with the Protocol and made available to the Access and Benefit-sharing Clearing-House, will constitute an internationally recognized certificate of compliance.

An internationally recognized certificate of compliance will serve as evidence that the genetic resource which it covers has been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the country providing prior informed consent.

The internationally recognized certificate of compliance must contain the following minimum information when it is not confidential:

(a) Issuing authority;

(b) Date of issuance;

(c) The provider;

(d) Unique identifier of the certificate;

(e) The person or entity to whom prior informed consent was granted;

(f) Subject-matter or genetic resources covered by the certificate;

(g) Confirmation that mutually agreed terms were established;

(h) Confirmation that prior informed consent was obtained; and

(i) Commercial and/or non-commercial use.

Mutually agreed terms

Countries must encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:

- (a) The jurisdiction to which they will subject any dispute resolution processes;
- (b) The applicable law; and/or
- (c) Options for alternative dispute resolution, such as mediation or arbitration.

Each country must ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms.

Each country must take effective measures, as appropriate, regarding:

- (a) Access to justice; and
- (b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.

Model Contractual Clauses (Article 19)

Each country must encourage, as appropriate, the development, update and use of sectoral and cross-sectoral model contractual clauses for mutually agreed terms.

Codes of Conduct, Guidelines and Best Practices and/or Standards (Article 20)

Each country must encourage, as appropriate, the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing.

Awareness-Raising (Article 21)

Each country must take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. These measures may include:

- (a) Promotion of the Protocol, including its objective;
- (b) Organization of meetings of Indigenous and local communities and relevant stakeholders;

- (c) Establishment and maintenance of a help desk for Indigenous and local communities and relevant stakeholders;
- (d) Information dissemination through a national clearing-house;
- (e) Promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders;
- (f) Promotion of, as appropriate, domestic, regional and international exchanges of experience;
- (g) Education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit-sharing obligations;
- (h) Involvement of indigenous and local communities and relevant stakeholders in the implementation of the Protocol; and
- (i) Awareness-raising of community protocols and procedures of Indigenous and local communities.

Capacity (Article 22)

Countries must cooperate in capacity-building, capacity development and strengthening of human resources and institutional capacities to effectively implement the Protocol in developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition, including through existing global, regional, subregional and national institutions and organizations. In this context, countries should facilitate the involvement of Indigenous and local communities and relevant stakeholders, including non-governmental organizations and the private sector.

The need of developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition for financial resources in accordance with the relevant provisions of the Convention must be taken fully into account for capacity-building and development to implement the Protocol.

As a basis for appropriate measures in relation to the implementation of the Protocol, developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition should identify their national capacity needs and priorities through national capacity self-assessments. In doing so, such countries should support the capacity needs and priorities of Indigenous and local communities and relevant stakeholders, as identified by them, emphasizing the capacity needs and priorities of women.

In support of the implementation of the Protocol, capacity-building and development may address the following key areas:

- (a) Capacity to implement, and to comply with the obligations of, the Protocol;
- (b) Capacity to negotiate mutually agreed terms;
- (c) Capacity to develop, implement and enforce domestic legislative, administrative or policy measures on access and benefit-sharing; and
- (d) Capacity of countries to develop their endogenous research capabilities to add value to their own genetic resources.

Measures may include:

- (a) Legal and institutional development;
- (b) Promotion of equity and fairness in negotiations, such as training to negotiate mutually agreed terms;
- (c) The monitoring and enforcement of compliance;
- (d) Employment of best available communication tools and Internet-based systems for access and benefit-sharing activities;
- (e) Development and use of valuation methods;
- (f) Bio-prospecting, associated research and taxonomic studies;
- (g) Technology transfer, and infrastructure and technical capacity to make such technology transfer sustainable;
- (h) Enhancement of the contribution of access and benefit-sharing activities to the conservation of biological diversity and the sustainable use of its components;
- (i) Special measures to increase the capacity of relevant stakeholders in relation to access and benefit-sharing; and
- (j) Special measures to increase the capacity of indigenous and local communities with emphasis on enhancing the capacity of women within those communities in relation to access to genetic resources and/or traditional knowledge associated with genetic resources.

Information on capacity-building and development initiatives at national, regional and international levels, should be provided to the Access and Benefit-sharing Clearing-House with a view to promoting synergy and coordination on capacity-building and development for access and benefit-sharing.

Technology Transfer, Collaboration and Cooperation (Article 23)

Countries must collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities, as a means to achieve the objective of the Protocol. Countries undertake to promote and encourage access to technology by, and transfer of technology to, developing countries, in particular the least developed countries and small island developing States among them, and countries with economies in transition, in order to enable the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the Convention and the Protocol. Where possible and appropriate these collaborative activities will take place in and with a country or the countries providing genetic resources that is the country or are the countries of origin of such resources or a country or countries that have acquired the genetic resources in accordance with the Convention.

Financial Mechanism and Resources (Article 25)

The financial mechanism of the Convention is the financial mechanism for the Protocol. Countries must also take into account the needs of developing countries, in particular the least developed countries and small island developing States among them, and of countries with economies in transition, in their efforts to identify and implement their capacity-building and development requirements for the purposes of the implementation of the Protocol.

Developed countries may also provide, and the developing countries and the countries with economies in transition avail themselves of, financial and other resources for the implementation of the provisions of the Protocol through bilateral, regional and multilateral channels

Relevant provisions of The Nagoya Protocol for this project

The following table summarises the provisions of the Nagoya Protocol and indicates those provisions that are relevant to developing a response to Australia's obligations on access and benefit sharing that are acceptable to Indigenous Australians. Some of the provisions relate to administrative matters under the Protocol so while Australia must address them they are not relevant to this project.

Article	Title	Subject matter	Relevant to project
1	OBJECTIVE	The purpose of the Protocol	Yes
2	USE OF TERMS	The meaning of particular terms in the Protocol	Yes

3	SCOPE	Identifies what the Protocol covers	Yes
4	RELATIONSHIP WITH INTERNATIONAL AGREEMENTS AND INSTRUMENTS	Defines how the Protocol interacts with other agreements	No
5	FAIR AND EQUITABLE BENEFIT-SHARING	Benefit sharing requirements that must be met to comply with the Protocol	Yes
6	ACCESS TO GENETIC RESOURCES	access requirements that must be met to comply with the Protocol	Yes
7	ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Access requirements that must be met to comply with the Protocol	Yes
8	SPECIAL CONSIDERATIONS	Addresses particular scenarios and obligations relating to access and benefit-sharing	Yes
9	CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE	Benefits arising from the use of genetic resources should be directed towards the conservation of biological diversity and the sustainable use of its components.	Yes
10	GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM	Dealing with multiple country resources	Yes
11	TRANSBOUNDARY COOPERATION	Dealing with multiple country resources	Yes
12	TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Respecting how traditional knowledge is manifested in different countries	Yes
13	NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES	This relates to how aspects of the Protocol are administered by the Australian government	Yes
14	THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE AND INFORMATION-SHARING	This relates to how aspects of the Protocol are administered by the Australian government	Yes
15	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	Yes
16	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFITSHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	Yes
17	MONITORING THE UTILIZATION OF GENETIC RESOURCES	This relates to monitoring and enhancing transparency regarding use of genetic resources	Yes

18	COMPLIANCE WITH MUTUALLY AGREED TERMS	Relates to including dispute resolution clauses in access and benefit sharing agreements. This is encouraged but not mandatory	Yes
19	MODEL CONTRACTUAL CLAUSES	Development of model clauses is encouraged but not mandatory	Yes
20	CODES OF CONDUCT, GUIDELINES AND BEST PRACTICES AND/OR STANDARDS	Relates to use of voluntary codes of conduct etc in relation to implementation of the Protocol	Yes
21	AWARENESS-RAISING	Relates to raising awareness regarding the Protocol and the genetic resources and traditional knowledge covered by the Protocol	Yes
22	CAPACITY	Relates to assisting developing nations implement the Protocol	Yes
23	TECHNOLOGY TRANSFER, COLLABORATION AND COOPERATION	Relates to research activities giving effect to the Protocol	Yes
24	NON-PARTIES	Procedural provision regarding administration of the Protocol	No
25	FINANCIAL MECHANISM AND RESOURCES	Procedural provision regarding administration of the Protocol	No
26	CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THIS PROTOCOL	Procedural provision regarding administration of the Protocol	No
27	SUBSIDIARY BODIES	Procedural provision regarding administration of the Protocol	No
28	SECRETARIAT	Procedural provision regarding administration of the Protocol	No
29	MONITORING AND REPORTING	Procedural provision regarding administration of the Protocol	No
30	PROCEDURES AND MECHANISMS TO PROMOTE COMPLIANCE WITH THIS PROTOCOL	Procedural provision regarding administration of the Protocol	No
31	ASSESSMENT AND REVIEW	Procedural provision regarding administration of the Protocol	No
32	SIGNATURE	Administrative provision regarding execution of the Protocol	No
33	ENTRY INTO FORCE	Procedural provision regarding commencement of the Protocol	No
34	RESERVATIONS	There are no reservations	No
35	WITHDRAWAL	Provisions regarding withdrawal from the Protocol	No
36	AUTHENTIC TEXTS	Lists the languages in which the Protocol has been published	No

Annex	MONETARY AND NON-MONETARY BENEFITS	Lists forms benefits could take	Yes
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WIPO initiatives

In Part 1 of this report we also discussed initiatives that the World Intellectual Property Organisation (WIPO) is pursuing to provide an international legal framework addressing effective protection of traditional knowledge and traditional cultural expressions in particular but also genetic resources. The final fate of these instruments is uncertain. If completed they may give rise to declarations which are non-binding or treaties which are binding on the parties that sign up to them. An informal report suggests that the drafts relating to traditional knowledge and traditional cultural expressions are more likely to be finalised than the draft relating to genetic resources which are covered by the Nagoya Protocol. That regime combines genetic resources to intellectual property rights and is therefore quite limited in scope.

At present the WIPO instruments are still in draft form and rather complex due to the presence of alternative wordings and options. However the drafts relating to traditional knowledge and traditional cultural expressions each feature a small number of articles that relate to key principles.

Below the draft articles relating to traditional knowledge have been reproduced in edited form. Alternative language has been eliminated to facilitate reading. This is the most extensive of the three instruments. Some alternatives and options have been maintained where divergent outcomes would result from the adoption of one form or the other. While the editing has been carried out without the intention of creating a bias in the document the original text is annexed for comparison in case this has happened inadvertently.

The Protection of Traditional Knowledge: Draft Articles summary

ARTICLE 1 SUBJECT MATTER OF PROTECTION

Definition of Traditional Knowledge

1.1 For the purposes of this instrument, “traditional knowledge” includes know-how, skills, innovations, practices, teachings and learnings of indigenous peoples and local communities that are

dynamic and evolving, and that are passed on from generation to generation, and which may subsist in codified, oral or other forms.

Definition of Traditional Knowledge Associated with Genetic Resources

1.2 Traditional knowledge associated with genetic resources means knowledge of the properties, and uses of genetic resources and their derivatives held by indigenous peoples and local communities

Criteria for Eligibility

1.3 Protection extends to traditional knowledge that is associated with the cultural, and social identity, or cultural heritage of beneficiaries as defined in Article 2, that is generated, maintained, shared in collective context, that is passed on from generation to generation and has been used for a term as may be determined by each Contracting Party but of not less than fifty years recognizing that there is cultural diversity amongst beneficiaries.

1.4 Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, in the public domain, protected by an intellectual property right or the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.

Databases

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

ARTICLE 2

BENEFICIARIES OF PROTECTION

2.1 Beneficiaries of protection are indigenous peoples and local communities who hold, maintain, use and/or develop the traditional knowledge as defined in Article 1.3.

2.2 Where traditional knowledge as defined in Article 1 is not specifically attributable or confined to an indigenous people or local community, [or] and it is not possible to identify the people or community that generated it, Contracting Parties may define [a]/[any] national entity defined by national legislation as a beneficiary.

ARTICLE 3

SCOPE OF PROTECTION

Option 1

3.1 Contracting Parties should confer the following rights on the beneficiaries, as defined in Article 2:

- (a) to maintain, control, protect and develop their traditional knowledge;
- (b) to authorize or deny access to and use based on prior and informed consent;
- (c) to have a fair and equitable share of benefits arising from the use of their traditional knowledge in accordance with the terms set out as a condition for the prior and informed consent;
- (d) to be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications;
- (dbis)* require the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.

3.2 In addition to the protection provided for in Paragraph 1, users of traditional knowledge which fulfills the criteria in Article 1.3 should:

- (a) acknowledge the source of traditional knowledge and attribute the beneficiary, unless the beneficiary decides otherwise; and
- (b) use the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with traditional knowledge.

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

Definition of “use”

For the purposes of this instrument, the term “use” in relation to traditional knowledge should refer to any of the following acts:

(a) Where the traditional knowledge is a product:

(i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.

(b) Where the traditional knowledge is a process:

(i) making use of the process beyond the traditional context; or

(ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

(c) When traditional knowledge is used for research and development leading to profitmaking or commercial purposes.

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

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

Optional addition

4.2 Member States should ensure that accessible, appropriate and adequate criminal, civil or administrative enforcement procedures are available under their laws against the misappropriation or misuse of traditional knowledge sufficient to constitute a deterrent to further infringements.

Optional addition

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

Optional addition

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

Optional addition

4.3 Where a dispute arises between beneficiaries or between beneficiaries and users of traditional knowledge, each party shall be entitled to refer the issue to an 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.

ARTICLE 4 BIS

DISCLOSURE REQUIREMENT

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

4 BIS.2 If the information set out in paragraph 1 is not known to the applicant, the applicant shall state the immediate source from which the 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 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.

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.

ARTICLE 5

ADMINISTRATION [OF RIGHTS]

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

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

Alternative

5.1 (a) Researchers and others should seek the prior informed consent of communities holding traditional knowledge, in accordance with customary laws of the concerned community, before obtaining protected traditional knowledge.

(b) The rights and responsibilities flowing from access to protected traditional knowledge should be agreed upon by the parties. The terms for the rights and responsibilities may include providing for the equitable sharing of benefits arising from any agreed use of the protected knowledge, the provision of benefits in exchange for access, even without benefits being derived from use of the traditional knowledge or other arrangements as agreed.

(c) Measures and mechanisms for obtaining prior informed consent and mutually agreed terms should be understandable, appropriate and not burdensome for all relevant stakeholders, in particular for protected traditional knowledge holders; and should ensure clarity and legal certainty.

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

[End of alternative]

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

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

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

ARTICLE 5 BIS

APPLICATION OF COLLECTIVE RIGHTS

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

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

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

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

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

General Exceptions

6.2 Contracting Parties may adopt appropriate limitations and exceptions under national law with the prior informed consent of the beneficiaries, provided that the use of traditional knowledge:

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

6.3 When there is reasonable apprehension of irreparable harm related to secret and sacred traditional knowledge, Contracting Parties should not establish exceptions and limitations.

6.4 Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible under the national law of a Contracting Party for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.

Specific Exceptions

6.5 Contracting Parties may permit the use of traditional knowledge in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, provided that the beneficiaries are adequately compensated without consent of the traditional knowledge holders.

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

6.7 Contracting Parties may adopt appropriate limitations or exceptions under national law for the following purposes:

(a) teaching, learning, but does not include research resulting in profit-making or commercial purposes;

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

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

(b) the creation of an original work of authorship inspired by traditional knowledge.

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

(a) has been independently created outside the beneficiaries' community;

(b) legally derived from sources other than the beneficiary; or

(c) is known through lawful means outside of the beneficiaries' community.

6.10 Protected traditional knowledge shall not be deemed to have been misappropriated or misused if the protected traditional knowledge was:

(a) obtained from a printed publication;

(b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent; or

(c) mutually agreed terms for access and benefit sharing apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.

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

ARTICLE 7

TERM OF PROTECTION

Option 1

Contracting Parties may determine the appropriate term of protection of traditional knowledge which should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 1.

ARTICLE 8

FORMALITIES

Option 1

8.1 The protection of traditional knowledge should not be subject to any formality.

Option 2

Contracting Parties may require formalities for the protection of Traditional knowledge.

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

ARTICLE 9

TRANSITIONAL MEASURES

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

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

Alternative

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

for access.

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Protection under this instrument should take account of, and operate consistently with, other international instruments and in no way affect the rights or the protection provided for in international legal instruments .

Optional additions

(a) In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future.

(b) The provisions under this instrument should in no way diminish the protection measures that have already been granted under the auspices of other instruments or treaties.

(c) These provisions should be applied in accordance to the respect of the cultural heritage of mankind as understood by UNESCO 2003 Convention of the protection of cultural and artistic expressions.

(d) They should be fully in line with the FAO's 2001 Treaty on resources and they should/shall be in line with the provisions of the UN Declaration on the rights of Indigenous Peoples adopted in 2007.

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

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

The rights and benefits arising from the protection of traditional knowledge under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a Contracting Party as defined by international obligations or undertakings. Eligible foreign beneficiaries should 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.

ARTICLE 12

TRANS-BOUNDARY COOPERATION

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

Option 1

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

Contracting Parties should consider cooperating in the creation of such databases, especially where traditional knowledge is not uniquely held within the boundaries of Contracting Parties. If protected traditional knowledge pursuant to article 1.2 is included in a database, the protected traditional knowledge should only be made available to others with the prior informed consent of the traditional knowledge holder. Efforts should 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, Contracting Parties should consider efficiencies that can be gained from international cooperation. The information made available to intellectual property offices should only include information that can be used to refuse a grant of cooperation, and thus should not include protected traditional knowledge. Efforts should be made by national authorities to codify the information related to traditional knowledge for the purpose of enhancing the development of databases of traditional knowledge, so as to preserve and maintain such knowledge. Efforts should also be made to facilitate access to information including information made available in databases relating to traditional knowledge by intellectual property offices. Intellectual property offices should ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application.

Optional addition to either option

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

Comparison with the provisions of the Nagoya Protocol

Article	Title	Subject matter	TK WIPO
1	OBJECTIVE	The purpose of the Protocol	Policy objectives included relating to recognition and value of TK
2	USE OF TERMS	The meaning of particular terms in the Protocol	TK and genetic resources associated with TK defined
3	SCOPE	Identifies what the Protocol covers	Article 3 Article 1 contemplates a minimum time of use to qualify and exempts public domain information
4	RELATIONSHIP WITH INTERNATIONAL AGREEMENTS AND INSTRUMENTS	Defines how the Protocol interacts with other agreements	Article 10
5	FAIR AND EQUITABLE BENEFIT-SHARING	Benefit sharing requirements that must be met to comply with the Protocol	3.1 addresses fair and equitable benefit sharing
6	ACCESS TO GENETIC RESOURCES	access requirements that must be met to comply with the Protocol	Does not deal with genetic resources <i>per se</i>
7	ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Access requirements that must be met to comply with the Protocol	3.1 considers prior informed consent Article 5 considers mutually agreed terms
8	SPECIAL CONSIDERATIONS	Addresses particular scenarios and obligations relating to access and benefit-sharing	Article 6.5
9	CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE	Benefits arising from the use of genetic resources should be directed towards the conservation of biological diversity and the sustainable use of its components.	Not addressed
10	GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM	Dealing with multiple country resources	Article 2.2
11	TRANSBOUNDARY COOPERATION	Dealing with multiple country resources	Article 12
12	TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Respecting how traditional knowledge is manifested in different countries	Article 3
13	NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES	This relates to how aspects of the Protocol are administered by the Australian government	Article 5
14	THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE	This relates to how aspects of the Protocol are administered	Article 5

	AND INFORMATION-SHARING	by the Australian government	
15	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	Article 11
16	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFITSHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	The articles define but do not expressly deal with traditional knowledge associated with genetic resources
17	MONITORING THE UTILIZATION OF GENETIC RESOURCES	This relates to monitoring and enhancing transparency regarding use of genetic resources	Does not relate to genetic resources
18	COMPLIANCE WITH MUTUALLY AGREED TERMS	Relates to including dispute resolution clauses in access and benefit sharing agreements. This is encouraged but not mandatory	Article 4
19	MODEL CONTRACTUAL CLAUSES	Development of model clauses is encouraged but not mandatory	Not provided for
20	CODES OF CONDUCT, GUIDELINES AND BEST PRACTICES AND/OR STANDARDS	Relates to use of voluntary codes of conduct etc in relation to implementation of the Protocol	Not provided for
21	AWARENESS-RAISING	Relates to raising awareness regarding the Protocol and the genetic resources and traditional knowledge covered by the Protocol	Policy objectives include awareness raising and respect for TK
22	CAPACITY	Relates to assisting developing nations implement the Protocol	Not provided for
23	TECHNOLOGY TRANSFER, COLLABORATION AND COOPERATION	Relates to research activities giving effect to the Protocol	Article 5bis
24	NON-PARTIES	Procedural provision regarding administration of the Protocol	Not relevant
25	FINANCIAL MECHANISM AND RESOURCES	Procedural provision regarding administration of the Protocol	Not relevant
26	CONFERENCE OF THE PARTIES SERVING AS THE	Procedural provision regarding administration of the Protocol	Not relevant

	MEETING OF THE PARTIES TO THIS PROTOCOL		
27	SUBSIDIARY BODIES	Procedural provision regarding administration of the Protocol	Not relevant
28	SECRETARIAT	Procedural provision regarding administration of the Protocol	Not relevant
29	MONITORING AND REPORTING	Procedural provision regarding administration of the Protocol	Not relevant
30	PROCEDURES AND MECHANISMS TO PROMOTE COMPLIANCE WITH THIS PROTOCOL	Procedural provision regarding administration of the Protocol	Not relevant
31	ASSESSMENT AND REVIEW	Procedural provision regarding administration of the Protocol	Not relevant
32	SIGNATURE	Administrative provision regarding execution of the Protocol	Not relevant
33	ENTRY INTO FORCE	Procedural provision regarding commencement of the Protocol	Not relevant
34	RESERVATIONS	There are no reservations	Not relevant
35	WITHDRAWAL	Provisions regarding withdrawal from the Protocol	Not relevant
36	AUTHENTIC TEXTS	Lists the languages in which the Protocol has been published	Not relevant
Annex	MONETARY AND NON-MONETARY BENEFITS	Lists forms benefits could take	No specific list

The Protection of Traditional Cultural Expressions: Draft Articles Summary

Below the draft articles relating to traditional cultural expressions have been reproduced in edited form. Alternative language has been eliminated to facilitate reading. Some alternatives and options have been maintained where divergent outcomes would result from the adoption of one form or the other. While the editing has been carried out without the intention of creating a bias in the document the original text is annexed in Appendix 2 for comparison in case this has happened inadvertently.

[ARTICLE 1]

SUBJECT MATTER OF PROTECTION

Option 1

Definition of Traditional Cultural Expressions

1. Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof,

Alternative 1: in which traditional culture [and knowledge] are [embodied]

Alternative 2: which are [indicative] of traditional culture [and knowledge]

which is intergenerational⁵/from generation to generation and between generations, including, but not limited to: phonetic and verbal expressions¹, [musical and sound expressions]², [expressions by action]³, tangible expressions⁴, [and adaptations of these expressions].

Criteria for Eligibility

2. Protection extends to traditional cultural expressions that are:

(a) [the result of the creative intellectual activity] of; [and/or]

(b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or]

(c) [held], maintained, used and/or developed as part of the cultural or social identity [or heritage] of the beneficiaries as defined in Article 2.

3. The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and, where applicable, regional law.

[Option 2

1. For the purposes of this instrument, “traditional cultural expressions” include any form of

[creative and other spiritual] expressions, tangible or intangible, or a combination thereof, such as phonetic and verbal¹, musical and sound², actions³, tangibles and materials⁴ [and their adaptations] regardless of the form in which it is expressed, illustrated or embodied and are:

- a) intergenerational⁵ and/or passed on from generation to generation;
- b) distinctive to or associated with the traditional culture, knowledge, or heritage of the beneficiaries; and
- c) maintained, used or developed as part of their collective culture or social identity.

2. The terminology used to describe the protected subject matter may be determined in accordance with national law and, where applicable, regional law.]

1 [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

2 [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

3 [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

4 [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

5 Intergenerational includes being passed on from generation to generation or between generations.

[ARTICLE 2]

BENEFICIARIES OF PROTECTION

Option 1

1. [Indigenous [Peoples] or [local communities] [or nations] who [hold, maintain, use [and/or] develop their traditional cultural expressions as part of their collective cultural or social identity] are the beneficiaries of protection in respect of those traditional cultural expressions as defined in Article 1 [or an entity defined by national legislation as a beneficiary].]

2. [Where a traditional cultural expression is not specifically attributable or confined to an/the Indigenous [People] or [local community] that [holds, maintains, uses [and/or] develops it] [and/or] it is not possible to [identify] the Indigenous [People] or [local community] that holds, maintains, uses or develops it, Contracting Parties may define [a]/[any] national entity as a beneficiary by national legislation.]

Option 2

[1. Beneficiaries of protection of traditional cultural expressions as defined in Article 1 are Indigenous [Peoples] and [local communities], or as determined by national law.

2. Where traditional cultural expressions as defined in Article 1 are not specifically attributable or confined to an/the indigenous [people] or [local community], or it is not possible to identify the

[indigenous people] or community that generated it, Contracting Parties may define any national entity defined by national legislation as a beneficiary.]

[ARTICLE 3]

SCOPE OF PROTECTION

[Option 1

The economic and moral interests of the beneficiaries concerning their traditional cultural expressions, as defined in Articles 1 and 2, should be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.]

[Option 2

Adequate and effective legal, administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to:

- (a) have exclusive and inalienable collective rights to authorize and prohibit the use⁶ and exploitation of traditional cultural expressions by others;
- (b) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions;
- (c) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (d) prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;
- (e) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

⁶ Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.

[ARTICLE 4

ADMINISTRATION OF RIGHTS/INTERESTS

Option 1 (merger of existing options)

1. Where so requested by the beneficiaries,

Alternative 1: a competent authority (regional, national or local)

Alternative 2: a national competent authority may, to the extent authorized by the beneficiaries, and in accordance with:

Alternative 1: the traditional-decision-making and governance processes of the beneficiaries

Alternative 2: customary protocols, understandings, laws and practices

Alternative 3: national law

Alternative 4: national procedure

Alternative 5: international law

carry out the following functions (but need not be limited to such functions):

- (a) conduct awareness-raising, education, advice and guidance functions;
- (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
- (c) grant licenses;
- (d) collect monetary or non-monetary benefits from the use of the traditional cultural expressions and provide them to the beneficiaries [for the preservation of traditional cultural expressions];
- (e) establish the criteria to determine any monetary or non-monetary benefits;
- (f) provide assistance in any negotiations for the use of the traditional cultural expressions and in capacity building;
- (g) [If determined by national law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights in relation to a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to a community]

[2. The management of the financial aspects of the rights should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries].

Option 2 (short option)

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].]

[ARTICLE 5]

EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary

context [consistent with national laws of the contracting parties where applicable].

2. Limitations on protection should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional [or] cultural context.

3. Contracting parties may adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

(a) are limited to certain special cases;

(b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]

(c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]

(d) [ensure that the [use] of traditional cultural expressions:

i. is not offensive or derogatory to the beneficiaries;

ii. acknowledges the beneficiaries, where possible;] and

iii. [is compatible with fair practice.]]]

4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following should be permitted [only with the free prior and informed consent of the beneficiaries]:

(a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education;

(b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions].

5. [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall/should not be prohibited by the protection of traditional cultural expressions].

ARTICLE 6

TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,

2. The protection granted to traditional cultural expressions against any distortion, mutilation

or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, should last indefinitely.

Option 2

At least as regards the economic aspects of traditional cultural expressions, their protection should be limited in time.

ARTICLE 7

FORMALITIES

[As a general principle], the protection of traditional cultural expressions should not be subject to any formality.

[ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

1. (Option 1): Appropriate measures should be provided, in accordance with national law, to ensure the application of this instrument, including legal, policy or administrative measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent.

1. (Option 2): Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions.

2. The means of redress for safeguarding the protection granted by this instrument should be governed by the national law of the country where the protection is claimed.

3. [Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.⁷]

⁷ Such as the WIPO Arbitration and Mediation Center.

[ARTICLE 9

TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into effect/force, fulfill the criteria set out in Article 1.

Option 1

2. The state should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

Option 2

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into effect, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities should have the right to recover such traditional cultural expressions.]

[ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Wild card (merger of Options 1 and 2)

Protection under this instrument should take account of, and operate consistently with, other international instruments, including those dealing with intellectual property and with cultural heritage.]

[ARTICLE 11

NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a prescribed contracting party as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the contracting party of protection, as well as the rights and benefits specifically granted by these international provisions.]

[ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional cultural expressions are located in territories of different

contracting parties, those contracting parties should co-operate in addressing instances of trans-boundary traditional cultural expressions.]

[End of Annex and of Document

Comparison of WIPO TCE articles with the provisions of the Nagoya Protocol

Article	Title	Subject matter	TCE WIPO
1	OBJECTIVE	The purpose of the Protocol	Covered in preliminary paragraphs
2	USE OF TERMS	The meaning of particular terms in the Protocol	Article 1 defines TCE
3	SCOPE	Identifies what the Protocol covers	Article 1 subject matter of protection
4	RELATIONSHIP WITH INTERNATIONAL AGREEMENTS AND INSTRUMENTS	Defines how the Protocol interacts with other agreements	Article 10 Article 11 deals with providing equivalent rights for other contracting parties
5	FAIR AND EQUITABLE BENEFIT-SHARING	Benefit sharing requirements that must be met to comply with the Protocol	Article 2 deals with who the beneficiaries are. Article 3 identifies the need to protect moral and economic interests of beneficiaries. Article 4 deals with rule setting and collection of benefits by a competent authority- there is no reference to a requirement for fair and equitable benefit sharing
6	ACCESS TO GENETIC RESOURCES	access requirements that must be met to comply with the Protocol	Does not deal with genetic resources
7	ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Access requirements that must be met to comply with the Protocol	Does not deal with genetic resources Article 3 deals with rights of beneficiaries to allow or prevent access to TCE
8	SPECIAL CONSIDERATIONS	Addresses particular scenarios and obligations relating to access and benefit-sharing	Article 5 makes provision for this but does not specifically address it
9	CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE	Benefits arising from the use of genetic resources should be directed towards the conservation of biological	Not addressed

		diversity and the sustainable use of its components.	
10	GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM	Dealing with multiple country resources	Not specifically addressed
11	TRANSBOUNDARY COOPERATION	Dealing with multiple country resources	Article 12
12	TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Respecting how traditional knowledge is manifested in different countries	Genetic resources not addressed Moral rights addressed in Article 3. Role of competent authority in awareness raising addressed in Article 4
13	NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES	This relates to how aspects of the Protocol are administered by the Australian government	Article 4 Article 8 deals with databases
14	THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE AND INFORMATION-SHARING	This relates to how aspects of the Protocol are administered by the Australian government	Not addressed
15	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING	This relates to Australia respecting the genetic resources of other countries	Genetic resources not addressed Moral rights addressed in Article 3. Role of competent authority in awareness raising addressed in Article 4
16	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFITSHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	Genetic resources not addressed Moral rights addressed in Article 3. Role of competent authority in awareness raising addressed in Article 4
17	MONITORING THE UTILIZATION OF GENETIC RESOURCES	This relates to monitoring and enhancing transparency regarding use of genetic resources	Article 4
18	COMPLIANCE WITH MUTUALLY AGREED TERMS	Relates to including dispute resolution clauses in access and benefit sharing agreements. This is encouraged but not mandatory	Article 8
19	MODEL CONTRACTUAL CLAUSES	Development of model clauses is encouraged but not	Not addressed

		mandatory	
20	CODES OF CONDUCT, GUIDELINES AND BEST PRACTICES AND/OR STANDARDS	Relates to use of voluntary codes of conduct etc in relation to implementation of the Protocol	Not addressed
21	AWARENESS-RAISING	Relates to raising awareness regarding the Protocol and the genetic resources and traditional knowledge covered by the Protocol	Article 4
22	CAPACITY	Relates to assisting developing nations implement the Protocol	Article 4 in terms of intra national activity
23	TECHNOLOGY TRANSFER, COLLABORATION AND COOPERATION	Relates to research activities giving effect to the Protocol	Not addressed
24	NON-PARTIES	Procedural provision regarding administration of the Protocol	Not relevant
25	FINANCIAL MECHANISM AND RESOURCES	Procedural provision regarding administration of the Protocol	Article 4
26	CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THIS PROTOCOL	Procedural provision regarding administration of the Protocol	Not relevant
27	SUBSIDIARY BODIES	Procedural provision regarding administration of the Protocol	Not relevant
28	SECRETARIAT	Procedural provision regarding administration of the Protocol	Not relevant
29	MONITORING AND REPORTING	Procedural provision regarding administration of the Protocol	Not relevant
30	PROCEDURES AND MECHANISMS TO PROMOTE COMPLIANCE WITH THIS PROTOCOL	Procedural provision regarding administration of the Protocol	Not relevant
Annex	Benefits	List of potential benefits	No list provided

Issues dealt with in WIPO TCE that are not addressed in the Nagoya Protocol

- Traditional cultural expressions specifically addressed
- Use of traditional knowledge independent of genetic resources
- Moral rights
- Transitional measures to address traditional knowledge already in use
- Same treatment for other contracting parties

Issues dealt with in the Nagoya Protocol that are not addressed in WIPO TCE

- Clear access provisions
- Clear benefit sharing provisions
- Prior informed consent
- Mutually agreed terms
- Model clauses
- Clearing house

Consolidated Document Relating to Intellectual Property and Genetic Resources Summary of draft articles

[ARTICLE 1]

SUBJECT MATTER OF [PROTECTION] [INSTRUMENT]

1.1 Protection under this instrument shall apply to any intellectual property right or application derived from utilization of genetic resources, their derivatives and associated traditional knowledge.

[ARTICLE 2]

[BENEFICIARIES]

2.1 Effective ABS systems implemented in national intellectual property laws should be beneficial to the public, genetic resource holders, supplier countries, indigenous and local communities, providers, the country of origin or providing country, and users of the genetic resources.

2.2 Protection related to the compliance with existing rules of access and benefit-sharing derived from the utilization of genetic resources, their derivatives and associated traditional knowledge shall be for the benefit of country providing such resources and knowledge and indigenous peoples and local communities who develop, use and maintain the genetic resources and associated traditional knowledge.

2.3 The beneficiaries of genetic resources, derivatives and associated traditional knowledge under this instrument must have the right to authorize or deny access to the genetic resources and associated traditional knowledge.

[ARTICLE 3]

[SCOPE OF [INSTRUMENT] [PROTECTION]] [LEGAL OBLIGATIONS]

Option 1

3.1 The scope of this instrument is to provide measures for the intellectual property system to support compliance with ABS regimes through the disclosure of country of source and origin of genetic resources, derivatives, and associated traditional knowledge and the provision of information to intellectual property offices to prevent grant of erroneous intellectual property and misappropriation and to enhance transparency in the intellectual property system.

Option 2

3.2 Member States may consider implementing national laws outside the intellectual property system to regulate conduct and manage access to genetic materials.

[DISCLOSURE PROTECTION

OPTION 1

FORMALITIES REQUIREMENTS FOR DISCLOSURE

Trigger

3.3 Each Party shall have a mandatory disclosure requirement for disclosure that applies to intellectual property rights that involve genetic resources, derivatives and associated traditional knowledge wherein:

- (a) the intellectual property makes immediate use of the genetic resource, that is, the intellectual property depends on the specific properties of the resource; and
- (b) the inventor possessed, or at least had contact which is sufficient enough to identify the properties of, the genetic resource relevant for the intellectual property.

3.4 Patent offices shall have a mandatory requirement for disclosure, as elaborated in this international legal instrument, when patenting of genetic resources would cause harm to the interests of indigenous [peoples] and local communities

3.5 The disclosure requirement for traditional knowledge in this instrument will only apply to patent applications that claim intellectual property for which the inventor consciously derived the intellectual property from associated traditional knowledge.

[Exclusions

3.6 A intellectual property disclosure requirement related to genetic resources their derivatives and associated traditional knowledge shall not apply to the following:

- (a) all human genetic resources including human pathogens;
- (b) [derivatives];
- (c) commodities;
- (d) traditional knowledge in the public domain;
- (e) genetic resources found outside of national jurisdictions; and
- (f) all genetic resources acquired before the national implementations of [the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].]

Contents of Disclosure

3.7 Contracting Parties shall require applicants [in good faith] to disclose

- (a) [Provider country]
- (b) [Source in provider country]
- (c) [Internationally Recognised Certificate of Compliance, or evidence of compliance, with ABS requirements, including PIC where relevant]
- (d) [Certificate of origin]
- (e) [Country of origin]
- (f) [If Country of origin not known, information on the source that the [inventor] [developer of intellectual property] had physical access to]
- (g) [Statement that origin is not known]
- (h) [Statement that source is not known]
- (i) [Primary source, or if not known, the secondary source]
- (j) [Written and oral information regarding [traditional knowledge associated with genetic resources] [associated traditional knowledge], [their derivatives] for enabling search and examination of the [patent] [intellectual property] application including the details of the holder of the traditional knowledge]
- (k) [a copy of the standard material transfer agreement stipulated in the ITPGRFA¹ if access to genetic resources has been provided in pursuance of the ITPGRFA]

Actions of the Office

3.8 The disclosure requirement shall not place an obligation on the [intellectual property] offices to verify the contents of the disclosure.

3.9 Contracting Parties or other relevant authorities shall put in place an adequate information dissemination system to enable an opportunity by relevant authorities for other Contracting Parties, indigenous and local communities or any other interested parties to take appropriate actions regarding ABS rules or submit information relevant to search and examination of an [intellectual property] application.

3.10 A simple notification procedure should be introduced to be followed by the [intellectual property] offices every time they receive a declaration; it would be adequate to identify in particular the Clearing House Mechanism of the CBD/ITPGRFA as the central body to which the [intellectual property] offices should send the available information.

¹ The International Treaty on Plant Genetic Resources for Food and Agriculture

3.11 [Genetic resources and their [derivatives] as found in nature or isolated therefrom shall not be considered as [intellectual property] and therefore no [intellectual property] rights shall be granted.]

3.12 [Intellectual property] offices receiving patent applications containing disclosures should inform a competent government agency that the respective State is declared as the source.

[Relationship with [PCT] and [PLT]

3.13 The [PCT] and [PLT] will be amended to [include] [enable Parties to the [PCT] and [PLT] to provide for in their national legislation] a mandatory disclosure requirement of the origin and source of the genetic resources, [their derivatives] and [associated traditional knowledge. The amendments shall also include requiring confirmation of prior informed consent, evidence of benefit sharing under mutually agreed terms with the country of origin.]

Sanctions and Remedies

Sub-Option 1

3.14 [Each [Party] [country] shall take appropriate, effective and proportionate measures to address situations of non-compliance under this international legal instrument [and relevant national laws and requirements] and to ensure that [accessible] [transparent, predictable] and appropriate compliance and dispute resolution mechanisms, sanctions and remedies are available.]

Sub-Option 2

3.15 [Each [Party] [country] shall take appropriate, effective and proportionate measures to address situations of non-compliance under this international legal instrument [and relevant national laws and requirements] and to ensure that [accessible] [transparent, predictable] and appropriate compliance and dispute resolution mechanisms, sanctions and remedies are available. Such measures shall include at least:

- (a) Publication of judicial ruling regarding failure to disclose, and
- (b) Prevent further processing of [intellectual property] applications, and
- (c) Prevent or refuse granting of] [intellectual property] applications, and
- (d) A [relevant authority] can consider the application [withdrawn] [lapsed] [nullified] [revoked] [invalidated] and
- (e) A [relevant authority] can consider the disclosure requirement shall affect the [revocation], [validity] or [enforceability] of granted patents.

Members may, but shall not be obliged to, apply other sanctions.]

Sub-Option 3

3.16 [Each [Party] [country] shall take appropriate, effective and proportionate measures to address situations of non-compliance under this international legal instrument [and national laws and requirements] and to ensure that [accessible] [transparent, predictable] and appropriate compliance and dispute resolution mechanisms, sanctions and remedies are available. Such measures shall include:

- (a) Publication of judicial ruling regarding failure to disclose
- (b) Prevent further processing of [intellectual property] applications
- (c) Prevent or refuse granting of [intellectual property] applications
- (d) A [relevant authority] can consider the application

withdrawn.

- (e) A [relevant authority] can invite the applicant to comply within a time limit.

Failure to fulfill the disclosure requirement [, in the absence of fraud,] shall not affect the validity or enforceability of granted patents.]]

[OPTION 2

NO DISCLOSURE REQUIREMENT

3.17 [Intellectual property] disclosure requirements shall not include a mandatory disclosure relating to genetic resources [, their derivatives] and [associated traditional knowledge] unless such disclosure is material to the patentability criteria of novelty, inventive step or enablement.

3.18 [Intellectual property] applicants shall be under no requirement to disclose the source, origin or other information relating to genetic resources in [intellectual property] applications [unless such information is material to the patentability requirements of novelty, inventive step or enablement.]]

[DEFENSIVE PROTECTION

[3.19 Establishment of databases of [traditional knowledge] [associated traditional knowledge] and genetic resources that are accessible to [intellectual property] [patent] offices [to

- (a) avoid granting of erroneous [intellectual property]
- (b) [prevent missappropriation]
- (c) [ensure [free] prior informed consent]
- (d) [ensure transparency, traceability and mutual trust taking into account access and benefit

sharing arrangements [as provided for under the CBD and the Nagoya Protocol].]]

3.20 Each country has responsibility for [codifying oral information], compiling and maintaining such databases, in accordance with national law.

3.21 There shall be minimum standards to harmonize the structure and content of such databases.

3.22 These databases will be accessible [only to [intellectual property] offices and other registered IP addresses] [to any interested parties].

3.23 The content of the databases will be

(a) [in languages that can be understood by patent examiners]

(b) [written and oral information regarding traditional knowledge associated with genetic resources, [their derivatives] for enabling search and examination of the [intellectual property] application including the details of the holder of the TK]

(c) relevant written and oral [information] prior art relating to genetic resources, [their derivatives] and [associated traditional knowledge].

(d) information related to genetic resources, [their derivatives] and [associated traditional knowledge].

3.24 [Such databases would [ensure the [free] prior informed consent] [prevent misappropriation] avoid the erroneous granting of [intellectual property] [patents] for genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and ensure transparency, traceability [and mutual trust taking into account access and benefit sharing arrangements [as provided for under the CBD and the Nagoya Protocol]].]

3.25 National [intellectual property] offices [shall] should develop appropriate and adequate guidelines for the purpose of conducting search and examination of [intellectual property] [patent] applications relating to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] considering [existing] [prior art] [this relevant information] accessible to the examiners, as appropriate [and additional information provided by the applicants, as well as accessible to the examiners].

3.26 [Establishment of an international gateway on traditional knowledge.]]

[ARTICLE 4]

RELATIONSHIP WITH INTERNATIONAL AGREEMENTS

4.1 [[Contracting Parties] shall establish a mutually supportive relationship between [intellectual property] rights [involving] [the utilization of]

genetic resources, [their derivatives] and [associated traditional knowledge] and existing international agreements and treaties, [but will not create a hierarchy between such international agreements and treaties, nor impose any of the obligations established under other international agreements or treaties upon any [party][country] that is not a [member] [party] to such international agreements or treaties].]

4.2 [[Contracting Parties] [Countries] shall support, in particular, the implementation of the [Convention on Biological Diversity] [(including communication with its Clearing House)] and [the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity], the ITPGRFA, [Article 31 of the UN Declaration on the Rights of Indigenous Peoples] and the TRIPS Agreement and, as the case may be, of regional agreements.]

[ARTICLE 5]

INTERNATIONAL COOPERATION

5.1 [[Relevant WIPO bodies to encourage Patent Cooperation Treaty members to develop a set of guidelines for the [search and examination] administrative disclosure of origin or source by the international search and examination authorities under the Patent Cooperation Treaty including additional information arising from the disclosure requirement as provided in this instrument.][WIPO could, in close collaboration with the [CBD]/ITPGRFA, consider the possible establishment of such a list of competent government agencies.]]

[ARTICLE 6]

TRANSBOUNDARY COOPERATION

6.1 [In instances where the same genetic resources [, their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] are found in in situ conditions within the territory of more than one Party, those Parties shall endeavor to cooperate, as appropriate, with the involvement of indigenous [peoples] and local communities concerned, where applicable, by taking measures that make use of customary laws and protocols, that are supportive of and do not run counter to the objectives of this instrument and national legislation.]

[ARTICLE 7]

TECHNICAL ASSISTANCE, COOPERATION AND CAPACITY BUILDING

7.1 [Relevant WIPO bodies shall develop modalities for the creation, funding and implementation of the provisions under this instrument. WIPO shall provide technical assistance, cooperation, capacity building and financial support for developing countries in particular the least developed countries to implement the obligations under this instrument.]
[End of Annex and of Document]

Comparison of WIPO GR articles with the provisions of the Nagoya Protocol

Article	Title	Subject matter	GR WIPO
1	OBJECTIVE	The purpose of the Protocol	Provided in preamble
2	USE OF TERMS	The meaning of particular terms in the Protocol	Provided in preamble
3	SCOPE	Identifies what the Protocol covers	Article 1- this instrument is about IP Article 3 compliance with ABS through regulation of iP with an option to regulate genetic resources separately
4	RELATIONSHIP WITH INTERNATIONAL AGREEMENTS AND INSTRUMENTS	Defines how the Protocol interacts with other agreements	Article 4, Article 5
5	FAIR AND EQUITABLE BENEFIT-SHARING	Benefit sharing requirements that must be met to comply with the Protocol	Benefit sharing mentioned in Article 2. A broad class of beneficiaries is defined not limited to Indigenous and local communities
6	ACCESS TO GENETIC RESOURCES	access requirements that must be met to comply with the Protocol	Access is mentioned in Article 2. The definition of beneficiaries potentially gives a say to parties other than Indigenous and local communities. Mention of prior informed consent at Article 3.7 but this is not mandatory
7	ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Access requirements that must be met to comply with the Protocol	Access is mentioned in Article 2. The definition of beneficiaries potentially gives a say to parties other than Indigenous and local communities. Mention of prior informed consent at Article 3.7 but this is not mandatory
8	SPECIAL CONSIDERATIONS	Addresses particular scenarios and obligations relating to access and benefit-sharing	Not addressed
9	CONTRIBUTION TO CONSERVATION AND SUSTAINABLE USE	Benefits arising from the use of genetic resources should be directed towards the conservation of biological diversity and the sustainable use of its components.	Not addressed

10	GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM	Dealing with multiple country resources	Not addressed
11	TRANSBOUNDARY COOPERATION	Dealing with multiple country resources	Not addressed
12	TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	Respecting how traditional knowledge is manifested in different countries	Not addressed
13	NATIONAL FOCAL POINTS AND COMPETENT NATIONAL AUTHORITIES	This relates to how aspects of the Protocol are administered by the Australian government	Some provision under Article 3
14	THE ACCESS AND BENEFIT-SHARING CLEARING-HOUSE AND INFORMATION-SHARING	This relates to how aspects of the Protocol are administered by the Australian government	Some provision under Article 3
15	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	Some provision under Article 3
16	COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFITSHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES	This relates to Australia respecting the genetic resources and traditional knowledge of other countries	Some provision under Article 3
17	MONITORING THE UTILIZATION OF GENETIC RESOURCES	This relates to monitoring and enhancing transparency regarding use of genetic resources	Some provision under Article 3
18	COMPLIANCE WITH MUTUALLY AGREED TERMS	Relates to including dispute resolution clauses in access and benefit sharing agreements. This is encouraged but not mandatory	Some provision under Article 3 but in context of disclosure in IP applications
19	MODEL CONTRACTUAL CLAUSES	Development of model clauses is encouraged but not mandatory	Not addressed
20	CODES OF CONDUCT, GUIDELINES AND BEST PRACTICES AND/OR STANDARDS	Relates to use of voluntary codes of conduct etc in relation to implementation of the Protocol	Not addressed
21	AWARENESS-RAISING	Relates to raising awareness regarding the Protocol and the genetic resources and traditional knowledge covered	Not addressed

		by the Protocol	
22	CAPACITY	Relates to assisting developing nations implement the Protocol	Article 7
23	TECHNOLOGY TRANSFER, COLLABORATION AND COOPERATION	Relates to research activities giving effect to the Protocol	Article 7
24	NON-PARTIES	Procedural provision regarding administration of the Protocol	Not relevant
25	FINANCIAL MECHANISM AND RESOURCES	Procedural provision regarding administration of the Protocol	Not relevant
26	CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THIS PROTOCOL	Procedural provision regarding administration of the Protocol	Not relevant
27	SUBSIDIARY BODIES	Procedural provision regarding administration of the Protocol	Not relevant
28	SECRETARIAT	Procedural provision regarding administration of the Protocol	Not relevant
29	MONITORING AND REPORTING	Procedural provision regarding administration of the Protocol	Not relevant
30	PROCEDURES AND MECHANISMS TO PROMOTE COMPLIANCE WITH THIS PROTOCOL	Procedural provision regarding administration of the Protocol	Not relevant

Issues dealt with in WIPO GR that are not addressed in the Nagoya Protocol

- Requirement to disclose use of genetic resources and/or traditional knowledge in patent applications but with significant exclusions

Issues dealt with in the Nagoya Protocol that are not addressed in WIPO GR

There is limited overlap between the two documents. The focus of the WIPO document is on IP issues not genetic resources and traditional knowledge *per se*.

Appendix 1

WIPO/GRTKF/IC/25/6

The Protection of Traditional Knowledge: Draft Articles Rev. 2 (April 26, 2013)²

POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize value

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

Promote awareness and respect

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

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

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

Promote [conservation and] preservation of traditional knowledge

(iv) promote and support the [conservation of and] preservation [of] [and respect for] traditional knowledge [by respecting, preserving, protecting and maintaining traditional knowledge systems [and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems]];

² Where two words, terms or phrases are separated by a forward slash, this indicates that according to the views expressed by the Committee, two options exist regarding the language in question, and indicates that the facilitators do not consider, in view of the Committee's discussions, the choice between the two options as having any significant policy implications.

Where two words, terms or phrases are square-bracketed and separated by a forward slash, this indicates that according to the views expressed by the Committee, two options exist regarding the language in question, and indicates that the facilitators consider, in view of the Committee's discussions, the choice between the two options as having potentially significant policy implications.

Empower [holders]/[owners] of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

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

Support traditional knowledge systems

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

Contribute to safeguarding traditional knowledge

(vii) while [recognizing the value of a vibrant public domain], contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary and community practices, norms, laws and understandings of traditional knowledge [holders]/[owners], for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general on the basis of prior informed consent and the mutually agreed terms with the [holders]/[owners] of that knowledge;³

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

(viii) repress the misappropriation of [protected] [secret] traditional knowledge and other unfair commercial and non commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of [protected] [secret] traditional knowledge to national and local needs;

Respect for and cooperation with relevant international agreements and processes

(ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit sharing from genetic resources which are associated with that traditional knowledge;

Promote innovation and creativity

(x) encourage and reward [and protect] tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous peoples and [traditional] local communities[, including, subject to the consent of the traditional knowledge [holders]/[owners], by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge];

Alternative

(x) [[safeguard and] promote innovation, creativity and the progress of science, and promote the transfer of technology on mutually agreed terms;]

³ One delegation proposed that paragraph (vii) be combined with paragraphs (iv) or (vi) for simplification.

[End of alternative]

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) promote the use of contractual arrangements between the holders of protected traditional knowledge and those who obtain protected traditional knowledge from such holders in order to ensure the [use] safeguarding of traditional knowledge on the basis of customary laws, protocols and community procedures [with] through prior informed consent and exchanges based on mutually agreed terms, in [coordination] line with existing international and national regimes governing access to genetic resources in a fair and equitable manner;

[Promote mandatory disclosure requirement

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

Alternative

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

Promote equitable benefit sharing

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

Promote community development and legitimate trading activities

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

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

(xiv) [curtail] impede the grant or exercise of [improper] intellectual property rights over traditional knowledge and associated genetic resources, by requiring [the creation of digital libraries of publicly known traditional knowledge and associated genetic resources], [in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit sharing conditions have been complied with in the country of origin];

Alternative

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

Enhance transparency and mutual confidence

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

Complement protection of traditional cultural expressions

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

[Utilization of traditional knowledge by third parties

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

[Promote access to knowledge and safeguard the public domain

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

Document and conserve traditional knowledge

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

Promote innovation

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

Alternative

(i) recognize the [holistic] [distinctive] nature of traditional knowledge, including its social, spiritual, economic, intellectual, educational and cultural importance;

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

(iii) meet the actual needs of [holders]/[owners] and users of traditional knowledge taking into account the fair and legitimate balance which must be struck between the relevant and different interests that have to be taken into consideration;

(iv) promote and support conservation, application and preservation of traditional knowledge;

(v) support traditional knowledge systems;

Alternative ((iv) + (v))

Promote the conservation of traditional knowledge

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

[End of alternative]

(vi) [repress] prevent [unfair and inequitable uses] illicit appropriation of traditional knowledge;

(vii) operate consistently with relevant international agreements and instruments [and processes];

(viii) promote the fair and equitable sharing of benefits arising from the use of traditional knowledge;

Alternative ((vi) + (viii))

Promote community development

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

[End of alternative]

(ix) enhance transparency and mutual confidence in relations between traditional knowledge

[holders]/[owners] on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct [and the principles of free and prior informed consent].

[End of alternative]

GENERAL GUIDING PRINCIPLES

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

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

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

Alternative

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

[End of alternative]

(c) Principle of effectiveness and accessibility of protection

(d) Principle of flexibility and comprehensiveness

(e) Principle of equity and benefit sharing

Alternative

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

[End of alternative]

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

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

Alternative ((f) + (g))

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

[End of alternative]

Alternative

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

[End of alternative]

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

Alternative

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

[End of alternative]

Alternative

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

[End of alternative]

(i) Principle of recognition of the specific characteristics of traditional knowledge

(j) Principle of providing assistance to address the needs of traditional knowledge holders

Alternative ((a) + (j))

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

(k) [Principle of recognizing that knowledge that is in the public domain is the common heritage of mankind]

(l) [Principle of protecting, preserving and expanding the public domain]

(m) [Principle of the necessity for new incentives to share knowledge and to minimize restrictions on access]

(n) Principle that any monopoly on the right to use certain information should be for a limited time

(o) Principle of protecting and supporting the interests of creators

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Definition of Traditional Knowledge

1.1 For the purposes of this instrument, “traditional knowledge” [refers to]/[includes]/[means] know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states]² that are dynamic and evolving, and that are intergenerational/and that are passed on from generation to generation, and which may subsist in codified, oral or other forms.

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

Definition of Traditional Knowledge Associated with Genetic Resources

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

Criteria for Eligibility

1.3 Protection extends [only] to traditional knowledge that is [distinctively] associated/linked with the cultural, [and] social identity, [and] or cultural heritage of beneficiaries as defined in Article 2, that is generated, maintained, shared/transmitted in collective context, that is intergenerational/that is passed on from generation to generation³ [and has been used for a term as may be determined by each [Member State]/[Contracting Party] but of not less than [fifty years]] [recognizing the [cultural] diversity of the beneficiaries] recognizing that there is cultural diversity amongst beneficiaries.

1.4 [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, [for a reasonable period of time], in the public domain, protected by an intellectual property right or the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.]

Databases

1.5 [Traditional knowledge that is contained in databases may be used to prevent the erroneous grant of [patents]/[intellectual property rights].]

² One delegation suggested that the phrase “a state or states” could be added to the phrase [indigenous [peoples] and [local communities]]; facilitators have used a forward slash and square brackets around the phrase “or a state or states” to indicate that the proposing delegation intends the phrase “or a state or states” to be an addition to, and not replace, the phrase [indigenous [peoples] and [local communities]].

³ Facilitators have reinserted the concept of “intergenerational/passed on from generation to generation” in 1.3 on the request of some delegations, but facilitators note that since this concept is already present in 1.1, it may not be necessary to repeat it here.

⁴ One delegation suggested that 1.3 could be moved to Article 7 (Term of Protection).

⁵ One delegation suggested that 1.4 could be moved to Article 6 (Exceptions and Limitations).

ARTICLE 2

BENEFICIARIES OF PROTECTION

2.1 Beneficiaries of protection are indigenous [peoples] and local communities [and nations] [who hold, maintain, use and/[or] develop] the [secret] [protected] traditional knowledge as defined in Article 1/1.3, [or any other national entity defined by national law.]

2.2 [Where [protected] traditional knowledge as defined in Article 1 is not specifically attributable or confined to an indigenous [people] or local community, [or] and it is not possible to identify the [people or] community that generated it, [Member States]/[Contracting Parties] may define [a]/[any] national entity defined by national legislation as a beneficiary.]

Optional addition

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

ARTICLE 3

SCOPE OF PROTECTION

Option 1

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

- (a) to maintain, control, [protect] and develop their [protected] [secret] traditional knowledge;
- (b) [to authorize or deny the access to and use/utilization based on prior and informed consent;]
- (c) to have a fair and equitable share of benefits arising from the use/utilization of their traditional knowledge in accordance with the terms set out as a condition for the prior and informed consent;

(d) [to be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications;]

(*dbis*) [require the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.]

3.2 [In addition to the protection provided for in Paragraph 1, users of traditional knowledge which fulfills the criteria in Article 1.3 [should]/[shall]]:

(a) acknowledge the source of traditional knowledge and attribute the beneficiary, unless the beneficiary decides otherwise; and

(b) use the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with traditional knowledge.

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

⁶ While two options are represented here, a number of delegations indicated their view that these two options are complementary and could be combined into a third option (which would thus comprise both Option 1 and Option 2), which one delegation said would be consistent with existing intellectual property treaties.

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

[For the purposes of this instrument, the term ["use"/["utilization"] in relation to traditional knowledge [should]/[shall] refer to any of the following acts:

(a) Where the traditional knowledge is a product:

(i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.

(b) Where the traditional knowledge is a process:

(i) making use of the process beyond the traditional context; or

(ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

(c) When traditional knowledge is used for research and development leading to profitmaking or commercial purposes.]⁷

Option 2

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

(a) discourage the unauthorized disclosure, use or other uses of [secret] [protected] traditional knowledge;

(b) where [protected] traditional knowledge is knowingly used outside the traditional context:

(i) [acknowledge the source of traditional knowledge and attribute its beneficiaries/holders/owners where known unless they decide otherwise];

(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its beneficiaries/holders/owners;

(iii) encourage beneficiaries and users to establish mutually agreed terms;

Alternative

(iii) ensure that[, where the traditional knowledge [is secret]/[is not widely known,]] traditional knowledge holders and users establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits in compliance with the right of local communities to decide to grant access to that knowledge or not;

⁷ Facilitators note that this proposed definition is not part of either option; certain delegations have suggested that it be part of any glossary or list of terms. Facilitators have left this proposed definition here as a placeholder.

[(c) facilitate the development of national traditional knowledge databases for the defensive protection of traditional knowledge;

(d) facilitate, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;

(e) provide opposition measures that will allow third parties to dispute the validity of a patent by submitting prior art;

(f) encourage the development and use of voluntary codes of conduct; and

(g) discourage information lawfully within the beneficiaries'/holders'/owners' control from being disclosed, acquired by or used by others without the beneficiaries'/holders'/owners' [consent], in a manner contrary to fair commercial practices, so long as it is secret, that reasonable steps have been taken to prevent unauthorized disclosure, and has value.]

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/APPLICATION

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

Optional addition

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

Optional addition

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

Optional addition

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

Optional addition

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

Alternative

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

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

[End of alternative]

ARTICLE 4 BIS

DISCLOSURE REQUIREMENT

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

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

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

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

Alternative

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

[End of alternative]

ARTICLE 5

ADMINISTRATION [OF RIGHTS]

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

- (a) disseminating information and promoting practices about traditional knowledge and its protection;

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

Alternative

- 5.1 (a) Researchers and others [should]/[shall] seek the prior informed consent of communities holding traditional knowledge, in accordance with customary laws of the concerned community, before obtaining protected traditional knowledge.
- (b) The rights and responsibilities flowing from access to protected traditional knowledge [should]/[shall] be agreed upon by the parties. The terms for the rights and responsibilities may include providing for the equitable sharing of benefits arising from any agreed use of the protected knowledge, the provision of benefits in exchange for access, even without benefits being derived from use of the traditional knowledge or other arrangements as agreed.
- (c) Measures and mechanisms for obtaining prior informed consent and mutually agreed terms [should]/[shall] be understandable, appropriate and not burdensome for all relevant stakeholders, in particular for protected traditional knowledge holders; and [should]/[shall] ensure clarity and legal certainty.
- (d) To assist transparency and compliance, [Member States]/[Contracting Parties] may establish a database to collect information on parties involved in agreements providing for mutually agreed terms as under Article 3. This information may be supplied by any of the parties involved in the agreement.

[End of alternative]

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

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

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

ARTICLE 5 BIS

APPLICATION OF COLLECTIVE RIGHTS

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

- (a) adopt appropriate measures to guarantee the safeguarding of traditional knowledge;
- (b) disseminate information and promote practices, studies and research for the conservation of traditional knowledge when it is required by their [holders]/[owners];
- (c) give assistance to the [holders]/[owners] on the exercise of their rights and

obligations in case of disputes with users;
(d) inform the public regarding the threats facing traditional knowledge;
(e) verify whether the users have obtained the free prior informed consent; and
(f) supervise the fair and equitable sharing of benefits derived from the utilization of traditional knowledge.

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

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

6.1 [Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context, [in accordance with national law].]8

General Exceptions

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

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

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

6.4 [Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible under the national law of a [Member State]/[Contracting Party] for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.]

Specific Exceptions

6.5 [[Member States]/[Contracting Parties] may permit the use of [protected] traditional knowledge in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use[, provided that the beneficiaries are adequately compensated.] without consent of the traditional knowledge [holders]/[owners].

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

6.7 [Member States]/[Contracting Parties] may adopt appropriate limitations or exceptions under national law for the following purposes:

(a) teaching, learning, but does not include research resulting in profit-making or commercial purposes;

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

(b) for preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes.

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

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

(b) the creation of an original work of authorship inspired by traditional knowledge.]

6.9 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 3 shall not apply to any use of knowledge that:]

(a) has been independently created [outside the beneficiaries' community];

(b) [legally] derived from sources other than the beneficiary; or

(c) is known [through lawful means] outside of the beneficiaries' community.]

6.10 [Protected traditional knowledge shall not be deemed to have been misappropriated or misused if the protected traditional knowledge was:

(a) obtained from a printed publication;

(b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent; or

(c) mutually agreed terms for access and benefit sharing apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.]

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

ARTICLE 7

TERM OF PROTECTION

Option 1

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

Optional additions to Option 1

(a) traditional knowledge is transmitted from generation to generation and thus is imprescriptible

(b) the protection [should]/[shall] applied and last for the life of indigenous peoples and local communities

(c) the protection [should]/[shall] remain while the immaterial cultural heritage is not accessible to the public domain

(d) the protection of secret, spiritual and sacred traditional knowledge [should]/[shall] last forever

(e) the protection against biopiracy or any other infringement carried out with the intention of destroying wholly or partially the memory, the history and the image of indigenous peoples and communities

Option 2

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

ARTICLE 8

FORMALITIES

Option 1

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

Option 2

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

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

Alternative

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

ARTICLE 9

TRANSITIONAL MEASURES

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

Optional addition

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

Alternative

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

Alternative

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

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

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

to the *Convention on Biological Diversity*].]

Optional additions

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

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

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

Alternative

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

[End of alternative]

Alternative

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

[End of alternative]

ARTICLE 12

TRANS-BOUNDARY COOPERATION

Facilitators' Option (Convergent Text)

In instances where traditional knowledge is located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] cooperate in addressing instances of transboundary traditional knowledge/by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation

[should]/[shall] be done with the participation [and [prior informed] consent] of the traditional knowledge [holders]/[owners].

Option 1

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

[Member States]/[Contracting Parties] [should]/[shall] consider cooperating in the creation of such databases, especially where traditional knowledge is not uniquely held within the boundaries of a [Member States]/[Contracting Parties]. If protected traditional knowledge pursuant to article 1.2 is included in a database, the protected traditional knowledge should only be made available to others with the prior informed consent of the traditional knowledge holder. Efforts [should]/[shall] also be made to facilitate access to such databases by intellectual property offices, so that the appropriate decision can be made. To facilitate such access, [Member States]/[Contracting Parties] [should]/[shall] consider efficiencies that can be gained from international cooperation. The information made available to intellectual property offices [should]/[shall] only include information that can be used to refuse a grant of cooperation, and thus [should]/[shall] not include protected traditional knowledge.

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

Efforts [should]/[shall] also be made to facilitate access to information including information made available in databases relating to traditional knowledge by intellectual property offices. Intellectual property offices [should]/[shall] ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application.]

Optional addition to either option

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

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

ARTICLE 1

Facilitators' Option (Convergent Text)

1.1 [developed in a traditional context]

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

Alternative

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

[End of alternative]

Facilitators' Option (Convergent Text)

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

Optional Additions to the Facilitators' Text

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

ARTICLE 2

Facilitators' Text

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

Optional Additions to the Facilitators' Text

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

Alternative

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

ARTICLE 3

Option 1

3.1

- (a) to develop, maintain, utilize, control, preserve and [protect] their traditional knowledge;
- (b) to authorize or deny the access to and use of their [secret] [protected] traditional knowledge;
- (d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without [their prior informed consent and] the establishment of mutually agreed terms;
- (e) prevent the use of traditional knowledge without acknowledgment and attribution of

the [source and] origin of their traditional knowledge and its holders/owners, where known;

Option 2

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

(a) prevent the unauthorized disclosure, use or other exploitation of [secret] [protected] traditional knowledge;

(b) where [protected] traditional knowledge is knowingly used outside the traditional context:

(i) acknowledge the source of traditional knowledge and attribute its holders/owners where known unless they decide otherwise;

(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders/owners;

(iii) [encourage]/[ensure, where the traditional knowledge] [is secret]/[is not widely known] traditional knowledge holders and users to establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits [arising from the commercial use of that traditional knowledge] in compliance with the right of local communities to decide to grant access to that knowledge or not.

ARTICLE 6

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

[Limitations on protection [should]/[shall] extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.]

[Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.] Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible for this parties under the national law for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.]

[End of Annex and of Document]

Appendix 2

The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2

WIPO/GRTKF/IC/25/7

OBJECTIVES

1. 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:

[1 alt. To provide beneficiaries with the appropriate measures, which may include legal and practical means, to:]

a. [prevent] the [misappropriation and misuse/offensive and derogatory use] of their traditional cultural expressions [and adaptations thereof]; and

b. control ways in which their traditional cultural expressions [and adaptations thereof] are used beyond the traditional and customary context [and promote the equitable sharing of benefits arising from their use], as necessary.

2. [To [prevent/preclude] the [grant], exercise and [enforcement] of intellectual property rights [acquired by unauthorized parties/inappropriately acquired] over traditional cultural expressions [and their adaptations]].

3. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free, prior and informed consent of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]

4. To protect/safeguard [and reward] [tradition-based] creativity [[and innovation] based on the traditional cultural expressions of Indigenous [Peoples] and [local communities] and nations / beneficiaries].

[4. alt. To protect and reward creativity and innovation by Indigenous Peoples and [local communities] for their traditional cultural expressions.]

[5. To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

[Principles / Objectives:] / [Preamble]

[6. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.

7. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.

8. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities]

[and nations] / beneficiaries, as well as all humanity.

9. [Recognizing]/[to recognize] the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.

10. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.

11. [Contributing]/[to contribute] to the promotion and protection of the diversity of traditional cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].

12. [Recognizing]/[to recognize] the importance of preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.

13. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]

[ARTICLE 1]

SUBJECT MATTER OF PROTECTION

Option 1

Definition of Traditional Cultural Expressions

1. Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof,

Alternative 1: in which traditional culture [and knowledge] are [embodied]

Alternative 2: which are [indicative] of traditional culture [and knowledge]

which is intergenerational⁵/from generation to generation and between generations, including, but not limited to: phonetic and verbal expressions¹, [musical and sound expressions]², [expressions by action]³, tangible expressions⁴, [and adaptations of these expressions].

Criteria for Eligibility

2. Protection extends to traditional cultural expressions that are:

(a) [the result of the creative intellectual activity] of; [and/or]

(b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of;
[and/or]

(c) [held], maintained, used and/or developed as part of the cultural or social identity [or heritage] of the beneficiaries as defined in Article 2.

3. The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and, where applicable, regional law.

[Option 2

1. For the purposes of this instrument, “traditional cultural expressions” include any form of [creative and other spiritual] expressions, tangible or intangible, or a combination thereof, such as phonetic and verbal¹, musical and sound², actions³, tangibles and materials⁴ [and their adaptations] regardless of the form in which it is expressed, illustrated or embodied and are:

a) intergenerational⁵ and/or passed on from generation to generation;

b) distinctive to or associated with the traditional culture, knowledge, or heritage of the beneficiaries; and

c) maintained, used or developed as part of their collective culture or social identity.

2. The terminology used to describe the protected subject matter may be determined in accordance with national law and, where applicable, regional law.]

1 [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

2 [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

3 [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

4 [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

5 Intergenerational includes being passed on from generation to generation or between generations.

[ARTICLE 2]

BENEFICIARIES OF PROTECTION

Option 1

1. [Indigenous [Peoples] or [local communities] [or nations] who [hold, maintain, use [and/or] develop their traditional cultural expressions as part of their collective cultural or social identity]

are the beneficiaries of protection in respect of those traditional cultural expressions as defined in Article 1 [or an entity defined by national legislation as a beneficiary].]

2. [Where a traditional cultural expression is not specifically attributable or confined to an/the Indigenous [People] or [local community] that [holds, maintains, uses [and/or] develops it] [and/or] it is not possible to [identify] the Indigenous [People] or [local community] that holds, maintains, uses or develops it, Contracting Parties may define [a]/[any] national entity as a beneficiary by national legislation.]

Option 2

[1. Beneficiaries of protection of traditional cultural expressions as defined in Article 1 are Indigenous [Peoples] and [local communities], or as determined by national law.

2. Where traditional cultural expressions as defined in Article 1 are not specifically attributable or confined to an/the indigenous [people] or [local community], or it is not possible to identify the [indigenous people] or community that generated it, Contracting Parties may define any national entity defined by national legislation as a beneficiary.]

[ARTICLE 3]

SCOPE OF PROTECTION

[Option 1

The economic and moral interests of the beneficiaries concerning their traditional cultural expressions, as defined in Articles 1 and 2, should be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.]

[Option 2

Adequate and effective legal, administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to:

- (a) have exclusive and inalienable collective rights to authorize and prohibit the use⁶ and exploitation of traditional cultural expressions by others;
- (b) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions;
- (c) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (d) prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;

(e) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

6 Use includes: fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution; any use for commercial purposes, other than their traditional use; and the acquisition or exercise of intellectual property rights.

[ARTICLE 4

ADMINISTRATION OF RIGHTS/INTERESTS

Option 1 (merger of existing options)

1. Where so requested by the beneficiaries,

Alternative 1: a competent authority (regional, national or local)

Alternative 2: a national competent authority may, to the extent authorized by the beneficiaries, and in accordance with:

Alternative 1: the traditional-decision-making and governance processes of the beneficiaries

Alternative 2: customary protocols, understandings, laws and practices

Alternative 3: national law

Alternative 4: national procedure

Alternative 5: international law

carry out the following functions (but need not be limited to such functions):

(a) conduct awareness-raising, education, advice and guidance functions;

(b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;

(c) grant licenses;

(d) collect monetary or non-monetary benefits from the use of the traditional cultural expressions and provide them to the beneficiaries [for the preservation of traditional cultural expressions];

(e) establish the criteria to determine any monetary or non-monetary benefits;

(f) provide assistance in any negotiations for the use of the traditional cultural expressions and in capacity building;

(g) [If determined by national law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights in relation to a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to a community]

[2. The management of the financial aspects of the rights should be subject to

transparency, concerning the sources and amounts of the money collected, the expenditures if

any to administer the rights, and the distribution of money to the beneficiaries].

Option 2 (short option)

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].]

[ARTICLE 5]

EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the contracting parties where applicable].

2. Limitations on protection should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional [or] cultural context.

3. Contracting parties may adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

(a) are limited to certain special cases;

(b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]

(c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]

(d) [ensure that the [use] of traditional cultural expressions:

i. is not offensive or derogatory to the beneficiaries;

ii. acknowledges the beneficiaries, where possible;] and

iii. [is compatible with fair practice.]]]

4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following should be permitted [only with the free prior and informed consent of the beneficiaries]:

(a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education;

(b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions].

5. [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall/should not be prohibited by the protection of traditional cultural expressions].

ARTICLE 6

TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,
2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, should last indefinitely.

Option 2

At least as regards the economic aspects of traditional cultural expressions, their protection should be limited in time.

ARTICLE 7

FORMALITIES

[As a general principle], the protection of traditional cultural expressions should not be subject to any formality.

[ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

1. (Option 1): Appropriate measures should be provided, in accordance with national law, to ensure the application of this instrument, including legal, policy or administrative measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent.
1. (Option 2): Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, [border measures], sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions.
2. The means of redress for safeguarding the protection granted by this instrument should be governed by the national law of the country where the protection is claimed.

3. [Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.⁷]

⁷ Such as the WIPO Arbitration and Mediation Center.

[ARTICLE 9

TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into effect/force, fulfill the criteria set out in Article 1.

Option 1

2. The state should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

Option 2

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into effect, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities should have the right to recover such traditional cultural expressions.]

[ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Wild card (merger of Options 1 and 2)

Protection under this instrument should take account of, and operate consistently with, other international instruments, including those dealing with intellectual property and with cultural heritage.]

[ARTICLE 11

NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a prescribed contracting party as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the contracting party of protection, as well as the rights and benefits specifically granted by these international provisions.]

[ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional cultural expressions are located in territories of different contracting parties, those contracting parties should co-operate in addressing instances of trans-boundary traditional cultural expressions.]

[End of Annex and of Document

Appendix 3

Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2

LIST OF TERMS

[Associated Traditional Knowledge

“Associated Traditional knowledge” means knowledge which is dynamic and evolving, generated in a traditional context, collectively preserved and transmitted from generation to generation including but is not limited to know-how, skills, innovations, practices and learning, that [subsist in] [that are associated with] genetic resources.]

[Traditional Knowledge Associated with Genetic Resources

“Traditional Knowledge Associated with Genetic Resources” means substantive knowledge of the properties and uses of genetic resources and their [derivatives] held by indigenous [peoples] and local communities [and which directly leads to a claimed [invention] [intellectual property]].]

[Biotechnology

“Biotechnology” [as defined in Article 2 of the Convention on Biological Diversity] means any technological application that uses biological systems, living organisms or [derivatives] thereof, to make or modify products or processes for specific use.]

[Country of Origin

“Country of origin” is the country which possesses genetic resources in in-situ conditions.]

[[Country Providing] [Providing Country]

“Country Providing/Providing Country” means, [in accordance with Article 5 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity], a [providing country] [country providing] that is the country of origin or that has acquired the genetic resources and/or that has accessed the traditional knowledge in accordance with the [Convention on Biological Diversity].]

[Country providing genetic resources

“Country providing genetic resources” is the country supplying genetic resources collected from in-situ sources, including populations of both wild and domesticated species, or taken from ex-situ sources, which may or may not have originated in that country.]

[Derivative

“Derivative” means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.]

Ex-Situ conservation

“Ex-Situ conservation” means the conservation of components of biological diversity outside their natural habitats.

Genetic Material

“Genetic material” means any material of plant, animal, microbial or other origin containing functional units of heredity.

Genetic Resources

"Genetic Resources" are genetic material of actual or potential value.

In situ conditions

“In situ conditions” means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties [Article 2, CBD].

[Internationally Recognized Certificate of Compliance

“Internationally recognized certificate of compliance” shall mean the instrument foreseen in Article 17.2 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.]

[Misappropriation

“Misappropriation” is the [acquisition] [utilization] of genetic resources [and] [or] associated traditional knowledge without the [free] [prior informed] consent of [those who are authorized to give [such] consent] [competent authority] to such [acquisition] [utilization], [[in accordance with national legislation] [of the country of origin or providing country]].]

[[Physical] Access

“[[Physical] access to the genetic resource” is its possession or at least contact which is sufficient enough to identify the properties of the genetic resource relevant for the [invention] [intellectual property].]

[Source

Option 1. “Source” refers to any source from which the applicant has acquired the genetic resource other than the country of origin, such as a resource holder, research centre, gene bank or botanical garden.

[Option 2 . “Source” should be understood in its broadest sense possible:

- (i) Primary sources, including in particular [Contracting Parties] [Countries] providing genetic resources, the Multilateral System of ITPGRFA, indigenous and local communities; and
- (ii) Secondary sources, including in particular ex situ collections and scientific literature.]]

[Utilization

“Utilization of Genetic Resources” means to conduct research and development [including commercialization] on the genetic and/or biochemical composition of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] [including through the application of biotechnology] [as defined in Article 2 of the Convention on Biological Diversity].]

[PREAMBLE

[Ensure respect for [sovereign rights] [the rights] of indigenous [peoples] and local communities [as well as [peoples] partially or entirely under occupation] over their genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources], including the principle of [prior informed consent and mutually agreed terms] and total and effective participation in accordance with international [agreements and] declarations [, in particular the UN Declaration on the Rights of Indigenous Peoples].]

[The [intellectual property] [patent] system should provide certainty of rights for legitimate users and providers of genetic resources, [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources].]

[Recognize the role the [intellectual property] [patent] system plays in promoting innovation, [transfer and dissemination of technology] to the mutual advantage of stakeholders, providers,

holders and users of genetic resources, their [derivatives] and[/or] [associated traditional knowledge] [traditional knowledge associated with genetic resources].]

[Promote transparency and dissemination of information.]

[A global and compulsory system creates a level playing field for industry and the commercial exploitation of [intellectual property] [patents], and also facilitates the possibilities [under Article 15(7) of the CBD] for the sharing of the benefits arising from the use of genetic resources.]

[Foster [patent] [industrial property] development of genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and encourage international research leading to innovation.]

[The disclosure of the source would increase mutual trust among the various stakeholders involved in access and benefit sharing. All of these stakeholders may be providers and/or users of genetic resources and traditional knowledge. Accordingly, disclosing the source would build mutual trust in the North – South – relationship. Moreover, it would strengthen the mutual supportiveness between the access and benefit sharing system and the [intellectual property] [patent] system.]

[Ensure that no [patents] [intellectual property] on life forms, including human beings, are granted.]]

POLICY OBJECTIVES

OBJECTIVE 1: [Compliance with International/National laws relating to ABS [and disclosure]]

[Ensure [applications for [intellectual property rights] [patents] [utilizing] genetic resources [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources]] [those accessing [and/or using]] genetic resources [,their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] comply with [international rights and national legislations] [national law and relevant conditions] for [requirements of the country providing for prior informed consent, mutually agreed terms, fair and equitable] [access and benefit-sharing] [and disclosure of origin].]

OBJECTIVE 2: Ensuring [intellectual property] [patent] offices have the required information to / and make proper decisions in granting [intellectual property] [patent] rights.

Option 1

Recognise the need for [intellectual property] [patent] offices to have access to appropriate information on genetic resources and [associated traditional knowledge] [traditional knowledge

associated with genetic resources] needed to make informed decisions to prevent grant of [intellectual property] [patents] that do not comply with novelty, inventiveness or industrial applicability.

Option 2

Ensure that [intellectual property] [Patent] offices [should] have [access to] [all] the appropriate information [on genetic resources, [their derivatives] and/or [associated traditional knowledge] [traditional knowledge associated with genetic resources]] needed to make proper and informed decisions in granting [intellectual property rights] [patents], to prevent granting of erroneous [patents] [intellectual property], [prevent misappropriation] and enhance transparency in the [patent] [intellectual property] system.

[ARTICLE 1]

SUBJECT MATTER OF [PROTECTION] [INSTRUMENT]

1.1 [[Protection under this instrument] [This international legal instrument][shall] [extend] apply to any [intellectual property] [patent] right or application [derived from [utilization of]] [directly based on] genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].]

[ARTICLE 2]

[BENEFICIARIES]

2.1 [Effective ABS systems implemented in national [patent] [intellectual property] laws should be beneficial to the public, [genetic resource holders, supplier countries,] indigenous and local communities, providers, the country of origin or providing country, and users of the genetic resources.]

2.2 [[This instrument should apply to] [Protection] [Measures] related to the compliance with existing rules of access and benefit-sharing derived from the [utilization] [for the protection] of genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] shall be for the benefit of country [providing such resources and knowledge] [of origin of genetic resources] and indigenous [peoples] and local communities who develop, use and maintain the genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources]].

[2.3 The beneficiaries of genetic resources, [derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] under this instrument

must have the right to authorize or deny [access to the] [use] [utilization] of genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources].]]

[ARTICLE 3]

[SCOPE OF [INSTRUMENT] [PROTECTION]] [LEGAL OBLIGATIONS]

Option 1

3.1 [The scope of this instrument is [to provide measures for the [intellectual property] [patent] system to support compliance with ABS regimes through the disclosure of [country of source and origin of] [information on] genetic resources, [derivatives], and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and [the provision of information to [intellectual property] [patent] offices to [prevent] [grant of erroneous [patents] [intellectual property]] and [misappropriation]] and to enhance transparency in the [intellectual property] [patent] system].]

Option 2

3.2 [Member States may consider implementing national laws outside the [patent] [intellectual property] system to regulate conduct and manage access to genetic materials.]

[DISCLOSURE PROTECTION]

OPTION 1

FORMALITIES REQUIREMENTS FOR DISCLOSURE

Trigger

3.3 [Each] [Party] [Country] [Intellectual property] [Patent] [offices] shall have a [mandatory] [disclosure] requirement for [disclosure that applies to] [patent] [intellectual property rights] applications that [claim [inventions] [intellectual property]] [involve] [arising from] [are directly based on] [utilization of] genetic resources, [derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] [wherein:

- (a) the [invention] [intellectual property] makes immediate use of the genetic resource, that is, the [invention] [intellectual property] depends on the specific properties of the resource; and
- (b) the inventor possessed, or at least had contact which is sufficient enough to identify the properties of, the genetic resource relevant for the [invention] [intellectual property].]

3.4 Patent offices shall have a mandatory requirement for disclosure, as elaborated in this international legal instrument, when patenting of genetic resources would cause harm to the interests of indigenous [peoples] and local communities

3.5 The disclosure requirement for traditional knowledge in this instrument will only apply to patent applications that claim [inventions] [intellectual property] for which the inventor consciously derived the [invention] [intellectual property] from [associated traditional knowledge] [traditional knowledge associated with genetic resources].

[Exclusions

3.6 A [patent] [intellectual property] disclosure requirement related to genetic resources [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] shall not apply to the following:

- (a) all human genetic resources including human pathogens;
- (b) [derivatives];
- (c) commodities;
- (d) traditional knowledge in the public domain;
- (e) genetic resources found outside of national jurisdictions; and
- (f) all genetic resources acquired before the national implementations of [the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity].]

Contents of Disclosure

3.7 [Contracting Parties] [Countries] [Intellectual property] [Patent] offices shall require applicants [in good faith] to disclose

- (a) [Provider country]
- (b) [Source in provider country]
- (c) [Internationally Recognised Certificate of Compliance, or evidence of compliance, with ABS requirements, including PIC where relevant]
- (d) [Certificate of origin]
- (e) [Country of origin]
- (f) [If Country of origin not known, information on the source that the [inventor] [developer of intellectual property] had physical access to]
- (g) [Statement that origin is not known]
- (h) [Statement that source is not known]
- (i) [Primary source, or if not known, the secondary source]
- (j) [Written and oral information regarding [traditional knowledge associated with genetic

resources] [associated traditional knowledge], [their derivatives] for enabling search and examination of the [patent] [intellectual property] application including the details of the holder of the traditional knowledge]

(k) [a copy of the standard material transfer agreement stipulated in the ITPGRFA if access to genetic resources has been provided in pursuance of the ITPGRFA]

Actions of the Office

3.8 The disclosure requirement shall not place an obligation on the [intellectual property] [patent] offices to verify the contents of the disclosure.

3.9 [Contracting Parties] [Countries] [Intellectual property] [patent] offices or other relevant authorities shall put in place an adequate information dissemination system to enable an opportunity by relevant authorities for other [Contracting Parties] [Countries], indigenous and local communities or any other interested parties to take appropriate actions regarding ABS rules or submit information relevant to search and examination of an [intellectual property] [patent] application.

3.10 A simple notification procedure should be introduced to be followed by the [patent] [intellectual property] offices every time they receive a declaration; it would be adequate to identify in particular the Clearing House Mechanism of the CBD/ITPGRFA as the central body to which the [intellectual property] [patent] offices should send the available information.

3.11 [Genetic resources and their [derivatives] as found in nature or isolated therefrom shall not be considered as [inventions] [intellectual property] and therefore no [patent] [intellectual property] rights shall be granted.]

3.12 [Intellectual property] [Patent] offices receiving patent applications containing disclosures should inform a competent government agency that the respective State is declared as the source.

[Relationship with [PCT] and [PLT]

3.13 The [PCT] and [PLT] will be amended to [include] [enable Parties to the [PCT] and [PLT] to provide for in their national legislation] a mandatory disclosure requirement of the origin and source of the genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources]. The amendments shall also include requiring confirmation of prior informed consent, evidence of benefit sharing under mutually agreed terms with the country of origin.]

Sanctions and Remedies

Sub-Option 1

3.14 [Each [Party] [country] shall take appropriate, effective and proportionate measures to address situations of non-compliance under this international legal instrument [and relevant national laws and requirements] and to ensure that [accessible] [transparent, predictable] and appropriate compliance and dispute resolution mechanisms, sanctions and remedies are available.]

Sub-Option 2

3.15 [Each [Party] [country] shall take appropriate, effective and proportionate measures to address situations of non-compliance under this international legal instrument [and relevant national laws and requirements] and to ensure that [accessible] [transparent, predictable] and appropriate compliance and dispute resolution mechanisms, sanctions and remedies are available. Such measures shall include at least:

- (a) Publication of judicial ruling regarding failure to disclose, and
 - (b) Prevent further processing of [patent] [intellectual property] applications, and
 - (c) Prevent or refuse granting of [patent] [intellectual property] applications, and
 - (d) A [relevant authority] [[patent] [intellectual property] office] can consider the application [withdrawn] [lapsed] [nullified] [revoked] [invalidated] and
 - (e) A [relevant authority] [[patent] [intellectual property] office] can consider the disclosure requirement shall affect the [revocation], [validity] or [enforceability] of granted patents.
- Members may, but shall not be obliged to, apply other sanctions.]

Sub-Option 3

3.16 [Each [Party] [country] shall take appropriate, effective and proportionate measures to address situations of non-compliance under this international legal instrument [and national laws and requirements] and to ensure that [accessible] [transparent, predictable] and appropriate compliance and dispute resolution mechanisms, sanctions and remedies are available. Such measures shall include:

- (a) Publication of judicial ruling regarding failure to disclose
- (b) Prevent further processing of [patent] [intellectual property] applications
- (c) Prevent or refuse granting of [patent] [intellectual property] applications
- (d) A [relevant authority] [[patent] [intellectual property] office] can consider the application withdrawn.
- (e) A [relevant authority] [[patent] [intellectual property] office] can invite the applicant to comply within a time limit.

Failure to fulfill the disclosure requirement [, in the absence of fraud,] shall not affect the validity or enforceability of granted patents.]]

[OPTION 2

NO DISCLOSURE REQUIREMENT

3.17 [Intellectual property] [Patent] disclosure requirements shall not include a mandatory disclosure relating to genetic resources [, their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] unless such disclosure is material to the patentability criteria of novelty, inventive step or enablement.

3.18 [Intellectual property] [Patent] applicants shall be under no requirement to disclose the source, origin or other information relating to genetic resources in [intellectual property] [patent] applications [unless such information is material to the patentability requirements of novelty, inventive step or enablement.]]

[DEFENSIVE PROTECTION

[3.19 Establishment of databases of [traditional knowledge] [associated traditional knowledge] [traditional knowledge associated with genetic resources] and genetic resources that are accessible to [intellectual property] [patent] offices [to
(a) avoid granting of erroneous [intellectual property] [patents]
(b) [prevent misappropriation]
(c) [ensure [free] prior informed consent]
(d) [ensure transparency, traceability and mutual trust taking into account access and benefit sharing arrangements [as provided for under the CBD and the Nagoya Protocol].]]]

3.20 Each country has responsibility for [codifying oral information], compiling and maintaining such databases, in accordance with national law.

3.21 There shall be minimum standards to harmonize the structure and content of such databases.

3.22 These databases will be accessible [only to [intellectual property] [patent] offices and other registered IP addresses] [to any interested parties].

3.23 The content of the databases will be

- (a) [in languages that can be understood by patent examiners]
- (b) [written and oral information regarding traditional knowledge associated with genetic resources, [their derivatives] for enabling search and examination of the [intellectual property] [patent] application including the details of the holder of the TK]

(c) relevant written and oral [information] prior art relating to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].

(d) information related to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources].

3.24 [Such databases would [ensure the [free] prior informed consent] [prevent misappropriation] avoid the erroneous granting of [intellectual property] [patents] for genetic resources and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and ensure transparency, traceability [and mutual trust taking into account access and benefit sharing arrangements [as provided for under the CBD and the Nagoya Protocol]].]

3.25 National [intellectual property] [patent] offices [shall] should develop appropriate and adequate guidelines for the purpose of conducting search and examination of [intellectual property] [patent] applications relating to genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] considering [existing] [prior art] [this relevant information] accessible to the examiners, as appropriate [and additional information provided by the applicants, as well as accessible to the examiners].

3.26 [Establishment of an international gateway on traditional knowledge.]]

[ARTICLE 4]

RELATIONSHIP WITH INTERNATIONAL AGREEMENTS

4.1 [[Contracting Parties] [Countries] shall establish a mutually supportive relationship between [intellectual property] [patent] rights [directly based on] [involving] [the utilization of] genetic resources, [their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] and existing international agreements and treaties, [but will not create a hierarchy between such international agreements and treaties, nor impose any of the obligations established under other international agreements or treaties upon any [party][country] that is not a [member] [party] to such international agreements or treaties].]

4.2 [[Contracting Parties] [Countries] shall support, in particular, the implementation of the [Convention on Biological Diversity] [(including communication with its Clearing House)] and [the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity], the ITPGRFA, [Article 31 of the UN Declaration on the Rights of Indigenous Peoples] and the TRIPS Agreement and, as the case may be, of regional agreements.]

[ARTICLE 5]

INTERNATIONAL COOPERATION

5.1 [[Relevant WIPO bodies to encourage Patent Cooperation Treaty members to develop a set of guidelines for the [search and examination] administrative disclosure of origin or source by the international search and examination authorities under the Patent Cooperation Treaty including additional information arising from the disclosure requirement as provided in this instrument.][WIPO could, in close collaboration with the [CBD]/ITPGRFA, consider the possible establishment of such a list of competent government agencies.]]

[ARTICLE 6]

TRANSBOUNDARY COOPERATION

6.1 [In instances where the same genetic resources [, their derivatives] and [associated traditional knowledge] [traditional knowledge associated with genetic resources] are found in insitu conditions within the territory of more than one Party, those Parties shall endeavor to cooperate, as appropriate, with the involvement of indigenous [peoples] and local communities concerned, where applicable, by taking measures that make use of customary laws and protocols, that are supportive of and do not run counter to the objectives of this instrument and national legislation.]

[ARTICLE 7]

TECHNICAL ASSISTANCE, COOPERATION AND CAPACITY BUILDING

7.1 [Relevant WIPO bodies shall develop modalities for the creation, funding and implementation of the provisions under this instrument. WIPO shall provide technical assistance, cooperation, capacity building and financial support for developing countries in particular the least developed countries to implement the obligations under this instrument.]

[End of Annex and of Document]