

## **The Protection of Traditional Cultural Expressions: Draft Articles**

## **Introduction**

This text represents the results at the conclusion of the IGC's 22<sup>nd</sup> session, in accordance with the mandate of the WIPO General Assemblies (contained in WO/GA/40/7). It represents a work in progress.

## **Facilitator's Notes**

This text has been prepared by the facilitator. Articles 1, 2 and 5 were further amended as a result of deliberations by the expert group. All other articles are the work of the facilitator only, based on the discussions that took place in the plenary. Articles 4, 8, 9, 10, 11 and 12 have been placed in brackets to reflect that some delegations either raised concerns about what the facilitator had proposed for these articles or wished to reflect further.

The objective has been to reduce the number of options and simplify the text. In preparing the text, the facilitator considered this objective, and took into account suggestions made during the first plenary discussion and in the expert group (for those articles discussed by the expert group). The facilitator did not have the opportunity to redraft after the second plenary discussion.

A commentary has been prepared for each article, which explains the suggested changes to each article, and identifies a number of outstanding issues.

Where options or alternatives are used, this text is not bracketed. However, where there is no consensus within options, brackets have been used.

Note that references to "shall" or "should" have been changed to "shall/should" throughout the document.

As the IGC did not have time to address the policy objectives and principles, this version of the text notes that they will be discussed at a later stage.

OBJECTIVES (to be discussed at a later stage)

The protection of traditional cultural expressions should aim to:

Recognize value

(i) recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation and misuse of traditional cultural expressions

(iv) provide indigenous peoples and communities and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and [derivatives] [adaptations] therefrom, and [control] ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions;

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of indigenous peoples and communities and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities and traditional and other cultural communities;

(ix) promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(x) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities;

Contribute to cultural diversity

(xi) contribute to the promotion and protection of the diversity of cultural expressions;

Promote the [community] development of indigenous peoples and communities and traditional and other cultural communities and legitimate trading activities

(xii) where so desired by [communities] indigenous peoples and communities and traditional and other cultural communities and their members, promote the use of traditional cultural expressions for [community based] the development of indigenous peoples and communities and traditional and other cultural communities, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;

Preclude unauthorized IP rights

(xiii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions and [derivatives] [adaptations] thereof;

Enhance certainty, transparency and mutual confidence

(xiv) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance
- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities
- (h) Respect for customary use and transmission of traditional cultural expressions
- (i) Effectiveness and accessibility of measures for protection

## ARTICLE 1

## SUBJECT MATTER OF PROTECTION

*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 pass from generation to generation and between generations], including, but not limited to:

- (a) phonetic or verbal expressions, [such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names, and symbols];
- (b) musical or sound expressions, [such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals];
- (c) expressions by action, [such as dances, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports, puppet performances, and other performances, whether fixed or unfixed]; and
- (d) tangible expressions, [such as material expressions] of art, [handicrafts, handmade carpets, architecture, and tangible spiritual forms, and sacred places];
- (e) [adaptations of the expressions referred to in the above categories].

*Criteria for eligibility*

2. Protection extends to traditional cultural expressions that are:

- (a) [the result of the creative intellectual activity] of;
- (b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or]
- (c) [held], maintained, used or developed as part of the cultural or social identity [or heritage] by

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.

## ARTICLE 2

### BENEFICIARIES OF PROTECTION

Beneficiaries of protection are indigenous [peoples] or [local communities], [or as determined by national law or by treaty] [who hold, maintain, use or develop] the traditional cultural expressions as defined in/determined by Article 1.

## 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, shall/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/should be provided to [safeguard the economic and moral interests of the beneficiaries, including but not limited to]:

- (a) prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions;
- (b) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (c) 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;
- (d) 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; and

*[there are two options for paragraph (e), which deals with commercial exploitation]*

(e) *Alternative 1:* where appropriate, enable beneficiaries to authorize the commercial exploitation of traditional cultural expressions by others.

(e) *Alternative 2:* ensure the beneficiaries have exclusive and [inalienable] collective rights to authorize and prohibit the following in relation to their traditional cultural expressions:

- (i) fixation;
- (ii) reproduction;
- (iii) public performance;
- (iv) translation or adaptation;
- (v) making available or communicating to the public;
- (vi) distribution;
- (vii) any use for commercial purposes, other than their traditional use; and
- (viii) 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 shall/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 shall/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/member States/members where applicable].
2. Limitations on protection shall/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/Member States/Members may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

Alternative 1:

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

Alternative 2:

- (a) is limited to certain special cases;
- (b) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
- (c) does not unreasonably prejudice the legitimate interests of the beneficiaries.

4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following shall/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 shall/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, shall/should last indefinitely.

*Option 2*

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

ARTICLE 7  
FORMALITIES

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

[ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS/INTERESTS

1. (Option 1): Appropriate measures shall/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, shall/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 shall/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 shall/should be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national law.<sup>1</sup>]]

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<sup>1</sup> 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 shall/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/force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, shall/should be brought into conformity with the provisions within a reasonable period of time after they enter into effect/force, 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 shall/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 shall/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 shall/should be available to all eligible beneficiaries who are nationals or residents of a prescribed country/contracting party/member State/member as defined by international obligations or undertakings. Eligible foreign beneficiaries shall/should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country/contracting party/member State/member 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/member States/members, those contracting parties/member States/members shall/should co-operate in addressing instances of trans-boundary traditional cultural expressions.]

## COMMENTS BY THE FACILITATOR

### COMMENTS ON ARTICLE 1

The following changes have been made to create Rev. I:

1. To achieve some structural consistency with the traditional knowledge (TK) draft text, two subheadings – definition of TCEs and criteria for eligibility – have been added.
2. As there was significant commonality between the two options, they have been merged to create one option, but with the points of disagreement or policy difference highlighted using square brackets, or through the use of alternatives. This approach allows us to better identify the areas of convergence and divergence.
  - (i) In the definition of TCEs the basic categories of TCEs are agreed, so are “clean” text, but we disagree on whether to include examples, so the examples are in square brackets; and
  - (ii) Consistent with the approach taken in the TK text, the two options for eligibility criteria have been condensed into one list. This should allow the IGC to more easily identify the eligibility criteria that can be agreed upon. Note also that a number of eligibility criteria referred to the definition of beneficiaries in Article 2. To avoid repetition, this reference to Article 2 now appears at the end of the list.
3. In the text from IGC 19, the concept of passing TCEs from generation to generation was dealt with in two different ways. Under one approach it was in the definition, and in the other it was dealt with in the eligibility criteria. In this version, it is included in the definition, which is consistent with the approach taken in the TK text. Note that this concept was objected to by one delegation during the first plenary, so the phrase now appears in square brackets.
4. A number of submissions were made during the first plenary to add matters to the definition of TCEs. This has resulted in the following changes to the text:
  - (a) To address the fact that works of mas can be both tangible and intangible, the example of works of mas has been moved to category (c);
  - (b) The example of handmade carpets has been added to category (d). During the expert group there was no objection to this from the proponents of the list approach;
  - (c) The reference to “traditional games and sports” has been changed to “games and traditional sports”;
  - (d) The concept of “generation to generation” has been supplemented with “between generations,” to address the situation that TCEs can skip generations; and
  - (e) In the expert group the brackets around “combination thereof” in paragraph 1 were removed to reflect that there could be three categories: tangible TCEs, intangible TCEs, and TCEs that are a combination of tangible and intangible elements (e.g., works of mas).
5. There was a proposal during the first plenary to refer to adaptations in relation to each category of TCEs; this has been reflected as a new sub-paragraph (e). The expert group discussed this issue and was generally of the view that it was not necessary to refer specifically to adaptations, because the fact that TCEs evolve over time was already captured in eligibility criterion (c) which refers to TCEs being developed. There was also the risk of confusion with the concept of adaptation that appears in Article 3. The delegation that suggested the addition of adaptations has been asked to consider if their concern could be addressed elsewhere.

6. The two proposals for paragraph 3, which provides domestic flexibility concerning the language used to describe TCEs in national law have been merged. There were two differences in the proposals:

- (i) One option referred to “terminology” while the other referred to “the specific choice of terms.” The facilitator used the “terminology” option, as it seems to be plainer drafting; and
- (ii) The second difference was whether to refer to the national level or to national, regional, and sub-regional levels. This version uses “national law and where applicable, regional law.” The reference to regional law was added by the expert group to address the situation of the European Union (further work may be required to determine if regional law is the most appropriate way to address the concept). The term “law” has been used as it is broader than “legislation” (law being a term that includes legislation, case law and regulation, etc.) and can accommodate federal systems.

Outstanding issues:

1. In the first sentence of the definition, the IGC was not able to agree on whether to include the term “artistic.” Some of those who propose it say it is necessary to distinguish TCEs from purely functional forms; those who oppose it point out that TCEs are not necessarily artistic and say it is subjective and limits the definition. The expert group considered whether there was an alternative to “artistic” that would meet the concerns on both sides, but was not able to do so.

2. In the two options under the definition of TCEs, there is no agreement on whether to say “in which traditional culture and knowledge are embodied” or “which are indicative of traditional culture and knowledge.” The expert group was leaning towards “embodiment,” but was not able to reach consensus. The proponents of “indicative” said that they could be flexible to consider alternative language that would address the relationship with TCEs.

3. A more substantive issue in the two alternatives in the definition of TCEs is the reference to “knowledge.” For many indigenous peoples, TCEs and TK are closely connected, with TCEs being the outward manifestation of the TK, which means it is important for the definition of TCEs to refer to TK. However, some delegations have concerns about referring to TK in the definition of TCEs, as this may result in duplicating the protection provided to TK across the two sets of draft articles. The expert group tried but failed to address the concern about duplication, while still retaining a reference to TK in the definition of TCEs. Two options were discussed: the use of a footnote or moving the reference to knowledge to the eligibility criteria.

4. There are still disagreements on whether the definition of TCEs should be based on general categories or should include lists of examples. The proponents of including the examples say that the list is only illustrative and that it provides greater certainty that particular subject matter is protected. The proponents of not including examples argue that it is not necessary for the examples to be listed to be covered, and consider that the inclusion of some examples leads us down the path of trying to include elements and inadvertently leaving things out. There was interest from some experts in exploring the use of a clarifying footnote to illustrate the examples in the lists. One of the key issues is whether the use of the lists is the only way to achieve the illustrative purpose.

5. In the list of eligibility criteria, the following issues have yet to be resolved:

- (a) There is disagreement on whether “creative intellectual activity” in paragraph 2(a) should be a criterion. The proponents of the concept took it from the WIPO Convention, adding “creative” to intellectual activity. They could not conceive of situations where a TCE would not result from some intellectual activity. There were concerns from others that not all instances of TCEs would qualify as intellectual activity (e.g., rituals), and questions

about how one would prove this criterion. Is there another way to reflect this concept that would address the concerns of those who oppose it?;

(b) In paragraph 2(b), there is disagreement on whether to say “distinctive of or the unique product” or “associated with.” One delegation was concerned that “associated with” is not adequate to exclude unauthentic TCEs, and suggested that the issue be given further reflection and discussion; and

(c) In paragraph 2, there may be some unnecessary repetition in the reference to “as part of the cultural or social identity or heritage” in both (b) and (c). This could be considered further.

## COMMENTS ON ARTICLE 2

The following changes have been made to create Rev. I:

1. Options 1 and 2 of the IGC 19 text have been replaced with a single paragraph. The reference to “as determined by national law” has been used to address the issues the IGC had been discussing concerning “nations.” The reference to “indigenous peoples or local communities” was an attempt to address the objections by some delegations to using the term “indigenous peoples.” This was not successful which is why “peoples” is in brackets, as is “local communities” as there is a concern by some that the term is not appropriately defined. The phrase “who hold, maintain, use or develop” is in brackets while some delegations do some further checking about the relationship to this phrase as used in Article 1.
2. The inclusion of the term “treaty” in addition to national law caused some confusion. The intended meaning is to refer to agreements with tribes in the United States. In this context treaty does not mean an international convention. The delegation that proposed the inclusion of “treaty” indicated that it would consult further to determine if such treaties could be included in the concept of national law.
3. Option 3 has been deleted as there was no support for this option.

## COMMENTS ON ARTICLE 3

The following changes have been made to create Rev I:

1. The basic policy options identified at IGC 19 have not been changed:
  - (a) The policy approach underlying Option 1 is that States should have maximum flexibility to determine the scope of protection; and
  - (b) The policy approach in Option 2 is more detailed and prescriptive, and includes two approaches to the issue of commercial exploitation within it. One is to prescribe the kinds of activities that should be regulated (the regulate approach). The other is a rights-based approach.
2. Minor formatting changes have been made to more clearly identify the alternatives for paragraph (e) under Option 2.
3. In Option 1, the reference to “beneficiaries of TCEs” has been changed to “concerning their TCEs” to better reflect the relationship between the interests and the TCEs. This is a modification of the language suggested by the Delegation of Canada.

4. In Option 2, language has been added to the beginning of the chapeau, as suggested in plenary, which is: “Adequate and effective legal or administrative or policy measures shall be provided to safeguard the economic and moral interests of the beneficiaries, including but not limited to.” This is reflected in square brackets, as the facilitator was not sure what degree of support it may have with other proponents of Option 2.

5. In Alternative 2 of subparagraph (e) of Option 2, one delegation expressed concerns about the use of the term “inalienable.” This word has been bracketed.

6. Similarly, in Option 2, subparagraph (a), one delegation had a concern about referring to secret TCEs only. The word “secret” has been bracketed to remind delegations to discuss it. The facilitator recalls that the sub paragraph refers to secret because it is only secret TCEs that have not yet been disclosed.

7. Alternative 2 from paragraph (e) in Option 2 – concerning equitable remuneration (as an alternative to an exclusive right) – has been removed. The facilitator did not hear support for this option.

#### COMMENTS ON ARTICLE 4

The following changes have been made to create Rev I:

1. Note: this is the first time a facilitator has worked on Article 4.

2. In the new Option 1, the options from IGC 19 have been merged and cleaned to more clearly identify the key concepts and remove instances of repetition. The key concepts identified are as follows:

(a) The administration of rights being at the behest of the beneficiaries (there are several variations of this in paragraph 1 of the IGC 19 text, e.g. “management of the rights belongs to the beneficiaries,” “where authorizations are granted/given,” “acting at the request ...”, “Where so requested by and in consultation with the beneficiaries,” “with prior informed consent and approval and involvement”), and this concept was also repeated within the suggested activities for the authority. In Rev. I, the phrase “where so requested by and to the extent authorized by the beneficiaries” is used to reflect the concept, as it seems to be the plainest and most encompassing form of drafting. There is no need to repeat the concept in the list of functions.

(b) Concerning the functioning of the authority being in accordance with something, the options are:

(i) Traditional decision making and governance processes (this concept was repeated in the suggested activities for the authority). Note: in one place the IGC 19 text referred to “governance” and in another to “government.” It has been assumed that the later was a typo;

(ii) Customary law (Rev 1 uses the phrase “customary protocols, understandings, laws and practices” consistent with the TK text);

(iii) National law;

(iv) National procedure; and

(v) International law

(c) A set of functions for the authority (there is a range of options). Rev. I adds the concept of an authority not being limited to the list of possible functions, which is taken from the TK text. The lists of functions in paragraphs 1 and 2 have been combined, with repetition removed. It was not clear from the IGC 19 text whether or not there was support for particular functions; the functions are therefore not in square brackets at this stage. The exception is that the text in paragraph (d) “the preservation of traditional cultural expressions” is bracketed as this was an addition to the proposal at IGC 19 that did not seem to have widespread support.

(d) As to how to describe the authority, there are two basic policy approaches: (1) those who consider that the administration of rights is essentially a matter for indigenous peoples and local communities; and (2) those who consider that there should be government intervention through a national authority. Option 1 tries to encompass all the possibilities for a competent authority (national, regional or local). Option 2 refers to a national competent authority. Could we delete Option 2 if Option 1 covers all the possible approaches?

3. In the new Option 1, a new subparagraph (g) has been added to reflect the proposal from the Delegation of India. This has been edited slightly to refer to rights in relation to a TCE rather than rights of a TCE. This is in brackets to show that it is a new idea that has not yet been discussed by the IGC.

4. In addition to the key themes, the original paragraphs 2 and 3 contained proposals concerning reporting to WIPO and financial management. There was fairly widespread support for deleting paragraph 3 concerning reporting to WIPO, so this has been deleted. The new paragraph 2 is in square brackets because some delegations have expressed objections thereto.

5. The title has been changed to “administration of rights” to create consistency with the TK text. Some delegations suggested that we say rights/interests until we know the status of the instrument. It is suggested that that exact nature of the title be addressed at a later time when we have more certainty about how the instrument would deal with rights or interests.

6. A new much shorter Option 2 has been added, following the suggestions of a number of delegations. The point of this option is that the administration of rights is primarily a matter for indigenous peoples and local communities (etc.), so there is no need to be prescriptive. Where government assistance is sought, the specific functions would be a matter for the particular community and government to determine. The drafting has been inspired by the proposals of the Saami Council and the European Union, but taking language from the beginning of the long option. “Rights/interests” has been used to address the concerns of delegations that pointed out we have not yet decided this point, and the reference to “instrument” is also bracketed because we have not decided on the type of instrument.

Issues to discuss:

1. Is Option 2, the short option, a useful way of bridging our differences under the long option?
2. In Option 1 paragraph 1, do we need all the alternatives? For example, do we need national procedure and national law? And how would international law be relevant? Is the reference to “the traditional-decision-making and governance processes of the beneficiaries” covered by “customary protocols, understandings, laws and practices”? Can we use just one of these terms?

## COMMENTS ON ARTICLE 5

The following changes have been made to create Rev. I:

1. As the only differences between Options 1 and 2 were in paragraphs 4 and 5, the two options have been merged, with square brackets around paragraphs 4(b) and 5 to indicate where there was no agreement concerning mandatory exceptions for independent creation and permitted acts under copyright and trade mark law.
2. As requested by the delegation of Brazil, a third step has been added to complete the three-step test under paragraph 3. The extra step is “certain special cases.”
3. Some delegations had concerns about the exclusion of secret TCEs from paragraph 5, so part of this paragraph has been put in square brackets. These delegations are going to consult further on this point.
4. Some minor changes to paragraph 4(a) and (b) have been made, to add references to “education” and “borrowed from.” As these suggestions seem fairly non-controversial they have not been put in brackets at this stage.
5. In paragraph 4, the Delegation of Australia supported the proposal from the representative of FAIRA to add the reference to prior informed consent. This has been added in brackets as there is no consensus on this idea.

Outstanding issues:

1. Can we agree on one of the alternatives under paragraph 3? There seems to be more support for Alternative 2 than Alternative 1. If we cannot choose one of the formulations for drafting exceptions in national law, could we run the two together?
2. The facilitator was attracted to the idea of restructuring some of the exceptions language into the scope article (especially the matters dealt with in paragraphs 4(b) and 5), however the expert group was not able to address this issue, as key issues on the scope of protection remain unresolved.

## COMMENTS ON ARTICLE 6

The following changes have been made to create Rev. I.

Paragraph 3 of Option 1 has been removed as many delegations pointed out that it did not add anything to paragraph 1, which would apply to secret and non-secret TCEs in the same way.

## COMMENTS ON ARTICLE 7

The following changes have been made to create Rev. I:

One delegation proposed bracketing the opening phrase “as a general principle,” but there was no opportunity to discuss the implications of doing this. The facilitator recalls that this language is to cover the situation that formalities could be an optional requirement, but would not stand in the way of protection being offered.

## COMMENTS ON ARTICLE 8

The following changes have been made to create Rev. I:

1. Note: this is the first time a facilitator has worked on Article 8. The approach taken has been to more clearly identify the different policy approaches in the text (the flexible versus the prescriptive approach), and the areas of convergence and divergence.
2. One area of convergence is the idea that redress should be determined at the national level (this was in both options of the IGC 19 text). In response to a suggestion of one delegation, the reference to legislation has been changed to national law, to be consistent with other references in the document. This is now paragraph 2.
3. There was no consensus on the concept of alternative dispute resolution, so this is in brackets, but it could fit with either Option 1 or 2. This is now paragraph 3.
4. There are two options for paragraph 1 (flexible and prescriptive). In Option 1 of paragraph 1:
  - (a) Paragraphs 1 and 2 of the original Option 1 have been combined to streamline the drafting;
  - (b) Paragraph 2 of the old Option 1 had simply referred to “measures.” The phrase “legal, policy or administrative measures” has been added from the TK text, to provide some consistency between the two texts;
  - (c) The language “contracting parties” has been removed, and the new paragraph 1 Option 1 now starts in a similar way to new paragraph 1 Option 2. This achieves some consistency between the options for paragraph 1, and means we do not need to include both “contracting parties” and “member States.” That issue could be dealt with at the point that the IGC addresses the status of the instrument.
5. In Option 2 of paragraph 1, the reference to “border measures” has been bracketed because one of the proponents of the more specific approach had concerns about its inclusion.
6. Two paragraphs of Option 2 of the text from IGC 19 have been deleted, because they deal with issues that are or could be addressed in other articles. These are:
  - (a) Paragraph 2: the possible functions of a competent authority are dealt with in Article 4, concerning the administration of rights. If delegations consider this is an important function, it is suggested that this issue be dealt with in Article 4 (it has not yet been added to Article 4 in Rev. I).
  - (b) Paragraph 4: to create greater consistency with the TK text, it is suggested that this issue be dealt with in a new article on “trans-boundary cooperation.”
7. In response to the suggestion of some delegations, the reference to “rights” in the title has been complemented with a reference to “interests,” as we have not yet agreed on the scope of protection.

Outstanding issue:

Do delegations agree that matters concerning the functions of a competent authority and trans-boundary cooperation are better addressed in other articles?



## COMMENTS ON ARTICLE 9

The following changes have been made to create Rev. I.

1. There were suggestions from some delegations concerning the language “coming into force.” It was suggested that “coming into effect” is more common language, or that we should talk about the provisions commencing.
2. “Rights/interests” has been included in line with the concerns of some delegations that we have not yet determined the scope of protection.

## COMMENTS ON ARTICLE 10

The following changes have been made to create Rev. I:

1. The heading has been replaced with the equivalent heading from the TK text, for reasons of consistency and simplification.
2. Paragraph 2 of Option 1 has been deleted, as it is a provision about the term of protection. Term is dealt with in Article 6.
3. Options 1 and 2 have been combined to create the “wild card” option. The combined text seeks to balance the reference to international legal instruments that deal with intellectual property and those that deal with cultural heritage. In creating this option the drafting has been simplified. Language from the TK text (“take account of, and operate consistently with”) has been used to create some consistency between the two texts.
4. There were some interesting proposals put forward during the plenary, however the facilitator sought to be ambitious by reducing rather than increasing the number of options. The proposal put forward by the Delegation of Canada was as follows:
  1. *The provisions of this instrument shall/should not affect the rights and obligations of any State deriving from any existing international agreement. This paragraph is not intended to create a hierarchy between this instrument and other international instruments.*
  2. *Nothing in this instrument shall prevent the States from developing and implementing other relevant international agreements provided that they are supportive of and do not run counter to the objectives of this instrument.*

Outstanding issues:

1. Is the “wild card” option a possible way forward?
2. Three forms of language have been used in the existing options and in the TK text to reflect the principle of consistency with existing international obligations. It would be useful to discuss the differences between them, and whether we should use the language consistent with the TK text. The three options are:
  - (a) “take account of, and operate consistently with” (from the TK text);
  - (b) “does not replace and is complementary to” (Option 1 from IGC 19)
  - (c) “leave intact and should in no way affect” (Option 2 from IGC 19)

## COMMENTS ON ARTICLE 11

No changes have been made to create Rev. I.

Outstanding issues:

1. Because these issues are tied to the later question of the status of the instrument, and we have not yet had a thorough policy discussion about the different options for addressing international enforceability issues (national treatment, reciprocity, material reciprocity, and mutual recognition, etc.), the facilitator has not spent time redrafting the clause on national treatment. At some future point the Secretariat may be able to aid this discussion by preparing a range of fictional scenarios (country A and B, etc.), which would show the practical effect of the different options.
2. If the IGC does decide on national treatment, then the LMC text is an alternative to consider.

## COMMENTS ON ARTICLE 12

Outstanding issue:

The TCE text does not currently contain an article on trans-boundary cooperation. In the interests of achieving some consistency with the TK text, does the IGC wish to include an article on trans-boundary co-operation in the TCE text? A simplified version of the TK text has been included for discussion purposes. The facilitator also notes that the LMC text contains an article on trans-boundary cooperation.

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