

The WIPO IGC Revised Provisions for the Protection of Traditional Cultural Expressions – Policy Objectives and Core Principles

- Comments submitted by the Saami Council -

General observations

The Saami Council has previously commented extensively on the Policy Objectives and Core Principles contained in the Annex to Document 9/4, both during the IGC sessions and in written document submitted to the WIPO Secretariat, as requested. We essentially refer to these earlier submissions, and will here only offer comments on the most crucial issues contained in Document 9/4.

Generally speaking, we believe that the Traditional Cultural Expressions (TCEs) draft Policy Objectives and Core Principles have improved considerably during the course of the IGC. We particularly appreciate the fact that many of the observations submitted by indigenous peoples' representatives have found their way into the Policy Objectives and Core Principles. As a result, it is the Saami Council's position that the Policy Objectives and Core Principles now contain several elements that – if adopted and implemented – could prove very useful for the protection of indigenous peoples' TCEs. Still, certain improvements are necessary for the Guidelines to be acceptable.

Chiefly, our concern is that the Guidelines are not sufficiently clear on who are the owners, holders and custodians of TCEs. In addition, further work is needed to address the matter of TCEs that conventional IPR-regimes regard to be in the so-called public domain.

Comments on the specific provisions in the Guidelines

The Saami Council can accept the “**Objectives**” of the Policy Objectives and Core Principles, as drafted in Document 9/4. We particularly underline the importance of principles (iii) – respect for indigenous peoples' human and other rights – and (vi) –

respect for indigenous peoples' customary practices. These objectives are absolutely imperative in any regime on protection of TCEs.

Largely, we are also happy with the “**General Guiding Principles**”. Here, we place particular importance on that the Commentary to the Principle of responsiveness to aspirations and expectations of indigenous peoples clarifies that the responsiveness includes respect for indigenous customary laws. We have concern, however, with the Principle of balance, as explained in the Commentary. Certainly, there is a need to take into account also the interests of TCE-users. Still, interests can never be balanced against rights of TCE-holders, such as for example to their right to consent or not consent. Naturally, a right – particularly a human right - always take precedent over an interest.

The Saami Council is largely in agreement with most of the Substantive Provisions, too. We can support **Article 1** and **Article 2** as drafted, but with regard to the Commentary, we have to underline that the notion that our rights to TCEs should somehow be vested in a governmental office or agency is completely unacceptable.

With regard to **Article 3** we can sympathize with the three layer approach proposed. Even though this is not the way we would ideally want it to be, today, being realistic, a protection system for TCEs, agreeable to all, probably will have to distinguish between various forms of TCEs, based on the value and importance of that particular element to the originator of the TCE. We commend the inclusion of the reference to free, prior and informed consent, suggesting a right for indigenous peoples to exclusively determine over the central elements of our cultural heritage. That said, the Saami Council firmly believes that the lists contained in **Article 3 (a) (i) and (ii)** need to be enlarged, so that protection is extended to a larger part of indigenous TCEs, that conventional IPR-systems regard to be in the so called public domain. Further, we continue to have concern with the fact that protection for TCEs is made subject to registration in a public register. At least it should be clarified that the provision does not apply, should it be cultural sensitive for the people in question to register that particular element.

With regard to **Article 4**, we take comfort in the fact that the Commentary clarifies that a government agency only has a role to play in the management of TCEs if the people from which the TCE originates consents to such a process. We are concerned,

however, that the actual Article 4 – referring merely to “Consultation” – does not clearly convey this demand for consent. The article need to be redrafted accordingly.

On **Article 5**, the Saami Council finds ourselves in agreement with para. (a) (i) and (ii) as well as para. (b). The list in para. (a) (iii) is too inclusive, however. The reference to research is particularly troublesome, given that indigenous peoples traditionally have had – and continuous to have - a lot of problems with research institutions.

We are fine with **Article 6**.

With regard to **Article 7**, we have already flagged our concern with the demand for registration for protection of TCEs.

We are fine with **Article 8**, again, however, provided that it is clarified that the government agency gets involved in the enforcement of rights only to the extent indigenous peoples consent thereto.

As to **Article 9**, we can accept the intermediate solution chosen, acknowledging that it might take some time to bring IPR-legislation into conformity with the Objectives and Core Principles. Still, we need to see the reference to “respect for rights previously acquired by third parties” deleted.

We are fine with **Article 10**.

With regard to **Article 11**, we believe that this issue demands some further consideration. We would like to commend the WIPO Secretariat, however, for recognizing the role that indigenous customary legal systems must play a role also in cross-boundary protection of TCEs.

Conclusion

If the concerns outlined above are catered for, the Saami Council can support the adoption of the Policy Objectives and Core Principles, as well as the initiation of a process aiming at transferring the Guidelines into a legally binding document.

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- Comments submitted by the Saami Council -

General observations

The Saami Council has previously commented extensively on the Policy Objectives and Core Principles contained in the Annex to Document 9/5, both during the IGC sessions and in written document submitted to the WIPO Secretariat, as requested. We essentially refer to these earlier submissions, and will here only offer comments on the most crucial issues contained in the Guidelines.

Generally speaking, we believe that the Traditional Knowledge (TK) draft Policy Objectives and Core Principles have improved during the course of the IGC. We particularly appreciate the fact that some of the observations submitted by indigenous peoples' representatives have found their way into the Policy Objectives and Core Principles. As a result, it is the Saami Council's position that the Policy Objectives and Core Principles now contain elements that – if adopted and implemented – could prove very useful for the protection of indigenous peoples' TK. Still, a number of improvements are necessary for the Guidelines to be acceptable.

Comments on the specific provisions in the Guidelines

The Saami Council is largely in agreement with the **Policy Objectives**. We are concerned with, however, that the TK Policy Objectives are ambiguous as to who are actually the holders of TK, indeed considerably more ambiguous than the TCE Guidelines, that still also are far from perfect in this regard. For the Guidelines to be acceptable, we need to see it clarified that the right-holders to TK is the people from which the TK originates. Further, compared to the TCE Guidelines, the TK Policy Objectives place less emphasis on the importance of respecting the rights of the TK holders. We would need to see this corrected, as well.

We are generally in agreement with the **General Guiding Principles** too. However, in para. (b), the phrase “of indigenous peoples and local communities and other traditional knowledge holders”, needs to be added at the end of the provision. Further, in para. (f), after the reference to “legal systems”, we want to see the inclusion of the term “including customary legal systems”.

With regard to the **Commentary to the General Guiding Principles**, we agree with most parts of these as well, and particularly appreciate the highlighting of the importance of respecting the rights of TK holders, including the right to consent or not consent to access to TK as well as of indigenous customary laws pertaining to such issues.

As we have done repeatedly, the Saami Council reiterates our strong objection to para. (f) of the Commentary. Section (f) simply misrepresents international law, and would, if implemented, violate e.g. the UN Charter, which both WIPO and its member states obviously are bound to respect. We underline that we do not challenge the fact that states - as sovereigns – do have rights to genetic and other natural resources within their national borders. Equally firmly established under international law is, however, the existence of competing rights to such natural resources, such as indigenous peoples’ right to self-determination and our land and resource rights. Moreover, as human rights, these rights do not only compete with, but actually often precedent over the principle of state sovereignty. It is consequently simply a misrepresentation of international law to single out one right (state sovereignty) that pertain to genetic resources, without any reference whatsoever to the competing rights that also apply to such resources. There are two options. Either section (f) is altogether deleted from the Objectives and Core Principles. Alternatively, the provision is redrafted to accurately reflect international law on the area, i.e. references are included to all rights that compete with – and sometimes take precedent over - state sovereignty. We repeat that this is a deal-breaker for us. The Saami Council would denounce any Guidelines that include the language currently contained in section (f), in isolation. And so would, we believe, almost all other indigenous peoples’ representatives.

Further, the Saami Council strongly objects to para. (h), suggesting that indigenous peoples’ customary laws should be recognized only subject to national legislation.

This must be a drafting mistake, since obviously the recognition of the laws of one people cannot be dependent on the will of another. Any language suggesting otherwise would violate the fundamental principle of non-discrimination, a norm that constitutes *jus cogens* – a pre-emptory norm. It is outside the mandate of WIPO to adopt any language with legal implications that contradicts pre-emptory norms.

Turning to the **Substantive Principles**, we would like to register our concern with the drafting of **Article 1** – “Protection against Misappropriation”. Generally speaking, we think the scope of protection is too limited, as it will leave a substantial part of traditional knowledge that conventional IPR-regimes consider to be in the so called public domain continuously without protection.

We are fine with **Article 2** – “Legal form of Protection”, **Article 3** - “General Scope of Subject Matter”, **Article 4** - “Eligibility for Protection” and **Article 5** – “Beneficiaries of Protection”.

With regard to **Article 6** on benefit sharing, we can accept this one too, provided that para. 1 is clarified to express that benefit sharing can only take place following a correct application of the principle of free, prior and informed consent. Further, in para. 2, we would like to see the insertion of “if appropriate” after the word “need”.

As to **Article 7** on prior and informed consent, the Saami Council can accept this Article only if the phrase “subject to these principle and relevant national laws” is deleted from para. 1 and the phrase “as provided by applicable national legislation” from para. 2. The concept of free, prior and informed can be described as a bundle of rights, many of them human rights, such as, again, indigenous peoples’ right to self-determination and our land and resource rights. Per definition, human rights can never be subject to national legislation. Consequently, Article 7, as currently drafted, contradicts a fundamental international legal principle, and must be corrected accordingly. In this context, it can be added that it is our understanding that the aspiration is that the international regime shall be legally binding. Obviously, to render provisions in a legally binding international legal instrument subject to national legislation, constitutes a contradiction in terms.

Turning to **Article 8**, we have concerns with para. 1. (ii) and in particular with para. 2. Certainly, indigenous peoples generally are positive towards sharing our medical

practices to the benefit of humanity. Still, we find it unbalanced that para. 1. (ii) grants an open-ended licence for all government hospitals to freely use and dispose over our traditional knowledge. Even more problematic is, however, para. 2, which allows states to exclude from the principle of prior and informed consent all traditional knowledge which conventional IPR-regimes perceive to be in the so called public domain. This provision is completely unacceptable, as it excludes from protection a substantial bulk of indigenous knowledge, and thus to a large extent renders the Guidelines meaningless. Para. 2 needs to be deleted –or at least seriously modified – for the Guidelines to be at all acceptable.

We are fine with **Article 9** – “Duration of Protection”.

We can support **Article 10** – “Transitional Measures”, provided that the last sentence is deleted.

With regard to **Article 11** – “Formalities”, we support para. 1. Para. 2, however, need to be modified to clarify that no registration may take place without the consent of the TK holders. We believe this to be in line with international law on the area, including a recent similar decision by the CBD COP 8.

We need to see **Article 12** – “Consistency with the Legal Framework” deleted. As explained earlier, the Article as currently drafted contradicts well established international law and violates the UN Charter. Indigenous peoples have human rights to traditional knowledge and natural resources that can, per definition, not be subject to national legislation.

We could support **Article 13** – “Administration and Enforcement of Protection”, provided that at the end of para. 1. (a) (i) –(v) is added the phrase “in accordance with these Objectives and Core Principles and international law”.

With regard to **Article 14** - “International and regional protection”, our comments are similar to those on the TCE document. We thus believe that this issue warrants some further consideration, but emphasize the importance of recognizing the role that indigenous customary legal systems must play also in cross-boundary protection of TCEs.