

## BRAZIL

*The following comments were received through a communication from the Permanent Mission of Brazil in Geneva*

In addition to the comments and suggestions below, Brazil reserves the right to make additional comments and proposals in respect of any other aspect of future versions of the draft objectives and principles.

### COMMENTS AND SUGGESTIONS ON "POLICY OBJECTIVES":

Redraft objectives (i), (iv), (vii), (ix), (x), (xii) and (xiii)

#### I. Policy objectives

The protection of traditional knowledge should aim to:

Objective (i) – [Recognize value] – redraft final phrase as follows:

*(i) ... and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are as important as scientific knowledge"*

Objective (iv) – (Empower holders of TK) – should be reformulated as follows:

*[Acknowledge the distinctive nature of traditional knowledge systems]*

*(iv) be undertaken in a manner that empowers TK holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and of the need to tailor solutions to meet the distinctive nature of such systems, bearing in mind the need to ensure that the conventional intellectual property regime operates in a manner supportive of and that does not run counter to the protection of TK;*

Comments on the proposed changes:

The current wording contained in Annex I of Document WIPO/GRTKF/IC/7/5 suggests that the protection of Traditional Knowledge should take inspiration from existing forms of protection provided for intellectual creations and innovations. This is inappropriate because, in many cases, existing forms of intellectual property protection, such as patents and copyright, cannot and do not provide an adequate model or framework for protecting traditional knowledge. Most traditional knowledge systems are, in effect, much older

than the modern intellectual property regime and international conventions such as the Paris and Berne Conventions. One could hardly expect the latter instruments, which are the product of an entirely different cultural mindframe, to do full justice to the holistic character of traditional knowledge systems. One should look instead at new solutions tailored to address and respect the distinctive nature of traditional knowledge, including the adoption of measures with a view to ensuring that the existing IP regime is supportive of and does not run counter to the goal of TK protection.

Objective(vii) –[Repress unfair and inequitable uses] –Redraft so as to read as follows:

*(vii) repress the misappropriation of traditional knowledge and associated genetic resources;*

Objective(ix) –(Promote innovation and creativity) –Redraft so as to read as follows:

*[Promote tradition-based innovation and creativity]*

*(ix) encourage, reward and protect tradition-based creativity and innovation [DELETE rest of paragraph];*

Comments on the proposed deletions:

The suggestion contained in the current draft objectives (Document 7/5) that one should reward and protect traditional knowledge “*particularly when desired by traditional knowledge holders*” does not seem appropriate and should be deleted, as it appears to suggest that a system for the protection of TK could place a burden on traditional and local communities as it would require them to actively and explicitly indicate an interest in the protection of their knowledge. The rights of indigenous peoples in Brazil over their traditional knowledge are considered to be inalienable, imprescriptible and unrenounceable prior rights. Protection of TK should not and cannot be made subject to formalities and other conditions, including registration and publication.

The reference to transfer of technology in the paragraph also seems to be misplaced, given the context of the problem –the misappropriation of TK –which the IGC is trying to address. The current wording of Doc 7/5 seems to suggest that, in exchange for the protection of their knowledge, TK custodians should commit to transfer their traditional know-how to the “users” of traditional knowledge. This formulation appears to ignore the fact that, through misappropriation, ample TK has already been disseminated and used inappropriately, often without the consent of TK holders. The draft objectives and principles should seek to rebalance this situation, by placing an emphasis on the protection of TK and on the need to ensure prior informed consent, and not on the transfer of knowledge from TK custodians to the private sector.

Objective(x) –(Pro mote intellectual and technological exchange) –Redraft as follows:

Objective(x) –[Ensure prior informed consent and exchanges based on mutually agreed terms]

*(x) ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;*

Comments on proposed changes: the objective of protecting traditional knowledge from misappropriation can be effectively served only if enough emphasis is placed on the need to enforce prior informed consent. The current wording contained in Document 7/5, however, chooses to emphasize instead the continued promotion of access to TK and its widespread dissemination, which is not appropriate.

Objective(xii) –(Pro mote community development and legitimate trading activities) –Rephrase as follows:

*(xii) promote the use of traditional knowledge for community -based, recognizing the rights of traditional 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;*

Comments on proposed changes:

Characterizing TK as an “asset” of its holders, which could be “acquired” and alienated on the marketplace is inappropriate. Though TK holders may indeed wish to engage in the commercial exchange of products produced on the basis of their knowledge, treating TK rights as tradable assets goes too far. It is highly questionable whether such an approach would be compatible with traditional and indigenous worldviews. It would not, in any case, be compatible with the inalienable character of the prior rights of indigenous peoples over their knowledge.

Objective(xiii) –(Preclude the grant of invalid IP right) –Redraft as follows:

*[Preclude the grant of invalid IP rights]*

*(xiii) curtail the grant of invalid intellectual property rights over traditional knowledge and associated genetic resources, by requiring, 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 that prior informed consent and benefit sharing conditions have been complied with in the country of origin;*

COMMENTS AND SUGGESTIONS ON “GENERAL GUIDING PRINCIPLES”:

A5 – (Principle of equity and benefit sharing) – Redraft Paragraphs 1 and 2 as follows:

Para. 1: DELETE

Para. 2 should be a single paragraph and modified to read as follows:

*As a means of ensuring that the intellectual property regime is equitable and responsive to broader societal interests, the rights of TK holders over their knowledge should be fully recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of TK should be entitled to the fair and equitable sharing of benefits from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures established in accordance with the Convention on Biological Diversity, providing for the sharing of benefits arising from the utilization of genetic resources.*

A6 – (Principle of consistency with existing legal systems) – Redraft Paragraph 2 as follows:

*Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is consistent with and does not run counter to the objectives of traditional knowledge protection.*

A8 – (Principle of respect for customary use and transmission of traditional knowledge):

DELETE the words “ as far as possible and as appropriate ” in line 2 of the paragraph.

COMMENTS AND SUGGESTIONS ON “SPECIFIC SUBSTANTIVE PRINCIPLES”:

B1 – (Protection against misappropriation) – Reword Para. 3(iii) as follows

3.

*(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those IP rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;*

Comment on proposed changes: The current wording contained in Document t 7/5 suggests an overly subjective criterion for determining an act of misappropriation. The proposed changes seek to rectify this shortcoming.

B1.5 –[Recognition of the customary context] –change as follows:

DELETE the words “as far as possible and appropriate” in the third line of the paragraph.

B6 –(Equitable compensation and recognition of knowledge holders) –  
Redraft entire principle as follows:

*B6 –Fair and equitable benefit sharing and recognition of knowledge holders*

- 1. Traditional and local communities should be entitled to the fair and equitable sharing of benefits arising out of the commercial or industrial use of their traditional knowledge;*
- 2. Use of traditional knowledge for non-commercial purposes may give rise only to non-monetary benefit sharing, such as access to research outcomes and involvement of the source community in research and educational activities;*
- 3. Those using traditional knowledge beyond its traditional context should identify the source and origin of the knowledge, acknowledge its holders as the source of the traditional knowledge, and use and refer to the knowledge in a manner that respects and acknowledges the cultural values of its holders.*

B7 –(Principle of prior informed consent) –Redraft as follows:

Paragraph 1: DELETE the word “acquisition” in line 1

Paragraph 2: DELETE in its entirety

B8 –(Exceptions and limitations) –DELETE Paragraph 1 roman (iii)  
[other fair use or fair dealing]

B10 –(Application in time) –DELETE the last sentence of the paragraph  
[“Longstanding prior use in good faith... with the holders of the knowledge”]

B12 –(Consistency with the general legal framework) –Redraft paragraphs  
2 and 3 as follows:

2. Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is supportive of and does not run counter to the objectives of traditional knowledge protection.

Paragraph 3: DELETE

B13 – (Administration and enforcement of protection) – Redraft Para. 1 romanitos (iv), (v) and (vi), and Paragraph 2 as follows:

Para. 1:

(iv) determining fair and equitable benefit sharing;

(v) determining whether a right in traditional knowledge has been infringed, and for determining remedies;

(vi) assisting, where possible and appropriate, holders of TK to use, exercise and enforce their rights over their traditional knowledge.

Comment on proposed changes: The deletion of the words “acquired” and “acquire”, in romanitos (v) and (vi), respectively, are proposed. The rights of indigenous peoples over their traditional knowledge constitute inalienable prior rights, and cannot be simply “acquired” or alienated on the marketplace.

Para. 2. Redraft the last phrase of the paragraph as follows: (“... and should provide safeguards for legitimate third party interests and the public interest”).